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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 83

FRANK COSTELLO, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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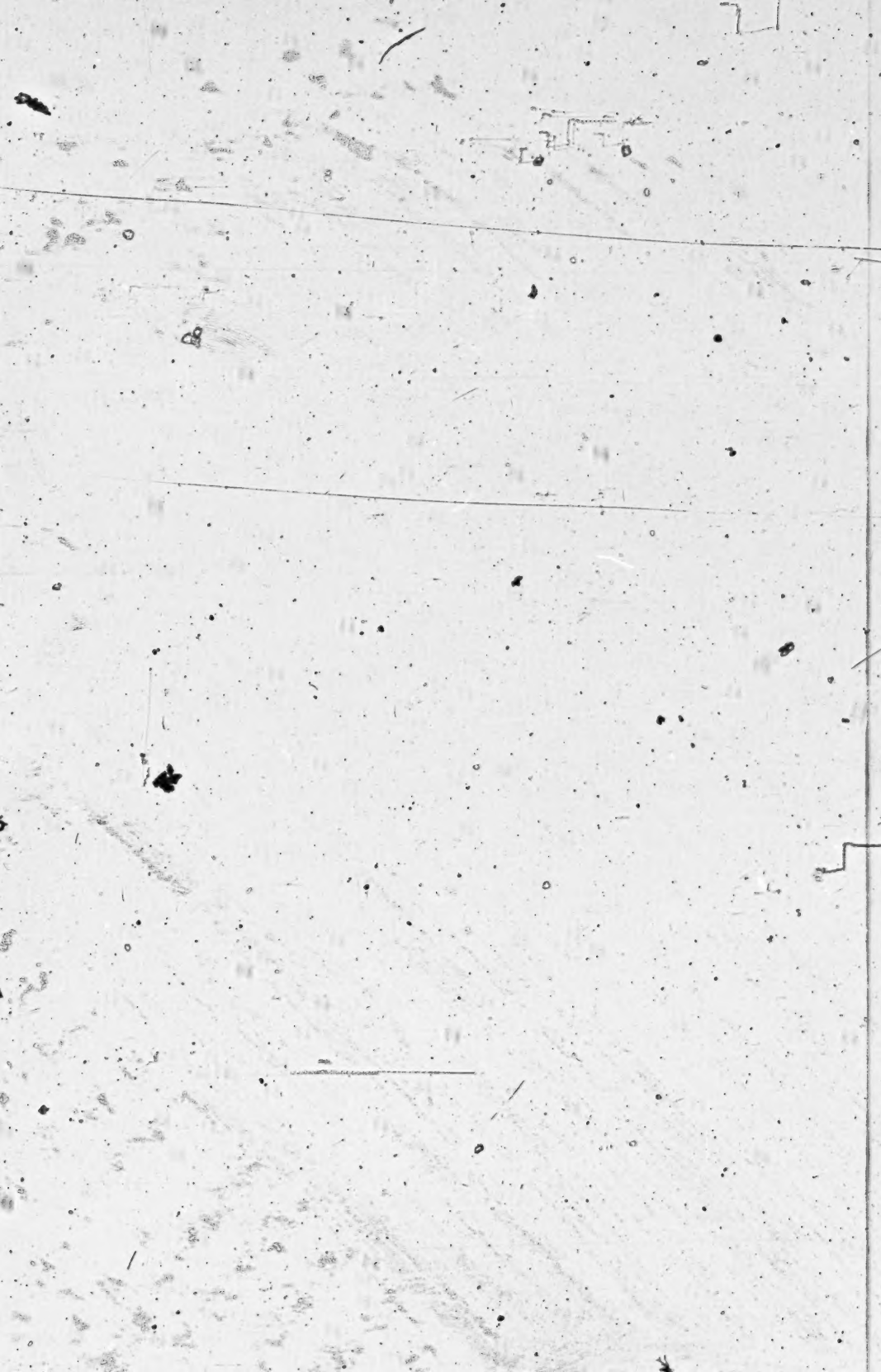

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No.

FRANK COSTELLO, *Petitioner*

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IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Frank Costello prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered December 4, 1962, dismissing his petition to review an order for his deportation.

OPINIONS BELOW

The June 21, 1961 decision and order of the Special Inquiry Officer of the Immigration and Naturalization Service directing petitioner's deportation, the January 2, 1962 decision and order of the Board of Immigration

Appeals dismissing petitioner's appeal, and the opinion of the Court of Appeals for the Second Circuit (not yet reported) dismissing petitioner's petition for review are printed in Appendix B hereto, *infra*, pp. 2a, 23a and 48a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1962. R. 137. The jurisdiction of this Court is invoked under 8 U.S.C. § 1105a (1961 Supp.), 5 U.S.C. § 1040 and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of § 241(a)(4) of the Immigration and Nationality Act of 1952 for deportation of an "alien . . . who at any time after entry is convicted of two crimes" applies to an individual who was a naturalized citizen when convicted.

2. Whether conviction of two counts of attempted income tax evasion for two successive years, in a prosecution based on the net worth-expenditures method, is conviction of "two crimes . . . not arising out of a single scheme of criminal misconduct" within the meaning of § 241(a)(4).

3. Whether the burden of proof on the issue of singleness of scheme may be imposed upon the alien sought to be deported.

4. If the alien has any burden of proof on the issue of singleness of scheme, whether considerations of due process permit denying him a subpoena to obtain the testimony on that issue of the attorney who defended him at his tax evasion trial.

5. Whether the conviction described in Question 2 *supra* is conviction of "two crimes involving moral turpitude . . . ."

STATUTE INVOLVED

The statutory provisions involved are Section 241 (a)(4), (b) of the Immigration and Nationality Act of 1952, 66 Stat. 204, as amended, 8 U.S.C. § 1251(a)(4), (b). They are printed in Appendix A, *infra*, p. 1a.

STATEMENT

Petitioner, born in Italy on January 26, 1891, was brought to the United States when he was four years old. He has resided here for almost sixty-eight years, his only absence from this country since his original entry being a short visit to Mexico in 1948. Petitioner is married to a United States citizen. On September 10, 1925, he became a naturalized citizen by order of the United States District Court for the Southern District of New York. R. 43, 66.

In 1954 petitioner was convicted of separate counts of attempting to defeat and evade income taxes for the years 1948 and 1949.[1] R. 48. His naturalization was cancelled by order of the United States District Court for the Southern District of New York on March 9, 1959 (R. 43), which order was subsequently affirmed by the Court of Appeals for the Second Circuit[2] and, on February 20, 1961, by this Court.[3] Thereupon re-

[1] The original conviction was on three counts, for the years 1947 through 1949. On appeal the conviction on the 1947 count was reversed and the other two affirmed. *United States* v. *Costello*, 221 F. 2d 668 (2nd Cir. 1955), *affirmed*, 350 U.S. 359.

[2] *United States* v. *Costello*, 275 F. 2d 355 (2nd Cir. 1960).

[3] *Costello* v. *United States*, 365 U.S. 265.

spondent instituted the deportation proceedings giving rise to this petition.

The deportation proceedings commenced with service of appropriate papers upon petitioner on March 31, 1961, while he was serving his tax evasion sentence at Atlanta Penitentiary. R. 2-8. After a hearing at the penitentiary, respondent's Special Inquiry Officer ordered petitioner deported as an "alien . . . who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . .", under the second part of § 241(a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1251(a)(4).[4] R. 61-62. The two crimes in question were the two counts of attempted tax evasion.[5] In the course of the hearing, petitioner applied for a subpoena calling the attorney who had defended him at his tax evasion trial, the witness being claimed to have knowledge of facts showing the successive-year evasions to have arisen out a single scheme

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[4] Hereinafter referred to as "§ 241(a)(4)".

[5] The government had urged two additional "crimes involving moral turpitude" in support of this ground of deportability—petitioner's 1952 contempt of Congress conviction and his 30-day imprisonment in 1957 by order of the Court of General Sessions of New York County for refusing to answer certain questions of a grand jury. R. 7-9. The Special Inquiry Officer, however, sustained petitioner's contentions that the contempt of Congress conviction did not involve moral turpitude and that the 1957 adjudication of contempt of court was not a conviction of a crime. R. 44-48.

As an independent ground of deportability, the government, relying on the first part of § 241(a)(4), contended that the tax evasions and the contempt of Congress were crimes "committed within five years after entry," the "entry" being petitioner's return from his visit to Mexico in 1948. R. 7. The Special Inquiry Officer rejected this ground of deportability because petitioner's 1948 return from Mexico was not an "entry" within the meaning of § 241(a)(4), since petitioner was then a citizen. R. 53-54.

of criminal misconduct. The application was denied without statement of any reason. R. 32-38.

From the order of deportation, petitioner duly appealed to the Board of Immigration Appeals (R. 63), which, on January 2, 1962, dismissed the appeal. R. 65. Petitioner then filed his petition for review in the court below. R. 92. On December 4, 1962, the court dismissed the petition (R. 138), holding:

> (1) that § 241(a)(4), providing for deportation of any "alien . . . who . . . is convicted", applies to one who was a naturalized citizen when convicted;
>
> (2) that petitioner's successive-year tax violations were two crimes "not arising out of a single scheme of criminal misconduct";
>
> (3) that the two violations were crimes "involving moral turpitude"; and
>
> (4) that the denial of petitioner's application for a subpoena was proper. R. 126-36.

REASONS FOR GRANTING THE WRIT

1. The initial question is whether petitioner, now an alien through denaturalization, may be deported for convictions which occurred while he was a citizen. "Because of the importance of the issue to American citizenship," this Court reviewed the question in a much narrower context,[6] in *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, 527. The statute there involved authorized deportation of "aliens who since August 1, 1914 have been or may

[6] See *United States ex rel. Brancato* v. *Lehmann*, 239 F. 2d 663, 666 (6th Cir. 1956).

hereafter be convicted of" certain espionage violations.[7] The instant statute obviously creates a much broader base of deportability—any crimes involving moral turpitude, rather than the specific espionage violations involved in the *Eichenlaub* statute. The importance of the issue to American citizenship is, therefore, greater here than in *Eichenlaub*. It is submitted that the Court should review the issue in the instant case because, as hereinafter shown, (a) the four-three decision in *Eichenlaub*, being based on the specific wording of the statute there involved (338 U.S. at 529-30), left the broad issue essentially unresolved; and (b) the decision below misapplies *Eichenlaub* in such a manner as to ignore the rule of construction announced in *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, and to conflict in principle with the Ninth Circuit's decision in *Mangaoang* v. *Boyd*, 205 F.2d 553 (1953), *cert. denied*, 346 U.S. 876, the Sixth Circuit's decision in *United States ex rel. Brancato* v. *Lehmann*, 239 F.2d 663 (1956), and respondent's own decision in *Matter of S—*, 5 I. & N. Dec. 678 (1954).

Over the strong dissenting view of three justices that established principles of construction of deportation statutes[8] required a decision against deportability, the majority of four justices in *Eichenlaub* held that the language "aliens who since August 1, 1914, *have*

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[7] The government argued that persons convicted of such violations while citizens and subsequently denaturalized for fraudulent procurement of citizenship have in legal effect never been citizens and, therefore, may be deported even if the statute requires that the convictions occur during alienage. The Court found it unnecessary to reach the government's contention. 338 U.S. at 529-30. A similar contention by the government in the instant case (R. 87-89) was similarly not reached by the court below.

[8] See cases cited at 338 U.S. 533.

been or may hereafter be convicted . . .' specifically authorized deportation of an alien who was a citizen when convicted. 338 U.S. at 529-30. The instant statute covers "any alien . . . who . . . *is* convicted." There is no suggestion in *Eichenlaub* that such a statute specifically authorizes deportation of an alien who was a citizen when convicted. Yet, the court below found such specific authorization and found, further that *Eichenlaub* "strongly supports" its construction and that there is no ambiguity requiring application of the principle of *Fong Haw Tan* v. *Phelan, supra.*[9]

The court below, reading into *Eichenlaub* more than this Court intended, has thus raised all the difficulties foreseen by the *Eichenlaub* dissent. Certainly it cannot here be said, as the majority said in *Eichenlaub,* that the statute is a clear expression of congressional intent to lump all denaturalized persons together and deport them for convictions occurring while they were citizens. Absent such a clear expression of intent, "alien . . . who . . . is convicted" must be read to cover only those aliens who were aliens when convicted. If Congress means to cover aliens who were convicted as citizens, it must adopt past-tense language similar to that in the *Eichenlaub* statute or to that in the exclusion statute, § 212(a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(9) ("Aliens who have been convicted . . .").

The use of the present tense in § 241(a)(4), if it does not clearly restrict deportation to persons convicted while they were aliens, must at least raise an ambiguity which, under the *Fong Haw Tan* principle

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[9] Referred to by the dissenting justices in *Eichenlaub*. See note 8, *supra*.

must be resolved against deportation. The court below held, however, that, since petitioner is now an alien, "there is no room for interpretation or construction." R. 129. "In the context of the statute," said the court, "the word 'is' appears to us to be the most comprehensive word that could have been used, just as is the case with the phrase 'at any time after entry'." R. 129-30. The court thus ignores the fact that in other subdivisions of the very same subsection of the 1952 Act, Congress, when it meant post-entry misconduct, no matter when occurring, to be a ground of deportability, did not use the so-called "comprehensive" word "is", but rather spelled out its meaning in clear and specific language.[10]

The contention that "is" may be read as "has been" in a deportation statute was rejected by the Ninth Circuit in *Mangaoang* v. *Boyd*, 205 F.2d 553 (1953), *cert. denied*, 346 U.S. 876, in holding that a statute permitting deportation of "aliens who are members

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[10] For example, deportation is authorized of any alien who:

§ 241(a)(7): "is engaged, or at any time after entry *has engaged*", in certain conduct;

§ 241(a)(11): "is, or hereafter at any time after entry *has been*, a narcotic drug addict, or who at any time *has been* convicted of a" narcotics violation;

§ 241(a)(12): "is or at any time after entry *has been* the manager, or is or at any time after entry *has been* connected with the management, of a house of prostitution or any other immoral place";

§ 241(a)(15): "at any time within five years after entry, shall *have been* convicted of violating the provisions of Title I of the Alien Registration Act, 1940";

§ 241(a)(16): "at any time after entry, shall *have been* convicted more than once of violating the provisions of Title I of the Alien Registration Act, 1940."

of . . . the Communist Party of the United States'"[11] was inapplicable to an alien who had been a member of the Communist Party while he was a "national" of the United States, but had abandoned that membership before losing his nationality. The court, distinguishing *Eichenlaub* on the statutory language, said:

> "We think that the language here under consideration, namely, 'Aliens who *are* members of * * * the Communist Party', (emphasis ours) was intended to refer to persons who are at the same time both aliens and members of the Communist Party. We think it was not sufficient to prove that the appellant was an alien at the time of his arrest and that he was a member of the Communist Party at some prior date on which he was not shown to have been an alien." 205 F.2d at 555.

The significance of the present-tense language of the *Mangaoang* statute was re-emphasized by the Ninth Circuit when it distinguished that case in sustaining a deportation order in *Resurreccion-Talavera* v. *Barber*, 231 F.2d 524, 525 (1956), under a statute applying to "any alien who was convicted . . . , prior to entry, of a . . . crime . . . involving moral turpitude. . . ."

The contention that *Eichenlaub* is authority for applying a present-tense deportation provision to an alien who was a citizen when the ground of deportation occurred was rejected by the Sixth Circuit in *United States ex rel. Brancato* v. *Lehmann*, 239 F.2d 663 (1956). Deportation was there sought under an earlier version of what is now the first part of § 241(a)(4), applying to "any alien who . . . is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral

[11] Internal Security Act of 1950, § 22, 64 Stat. 1006.

turpitude, committed within five years after the entry of the alien to the United States. . . ." In reversing the deportation order, the court said:

> "The ruling ordering deportation in United States ex rel. Eichenlaub v. Shaughnessy, supra, was based upon the statute of May 10, 1920, 8 U.S.C.A. § 157, which was a special statute dealing with sabotage and espionage during the first World War and applicable to some 650 aliens then in custody. We do not believe that the construction given to the different wording of that statute is applicable to the general deportation statute which we are now considering." 239 F.2d at 666-67.

The respondent itself, in its administration of the immigration laws, has distinguished between present-tense and past-tense language as affecting an alien who was a citizen when the ground of deportation occurred. Thus in *Matter of S—*, 5 I. & N. Dec. at 680 n. 2, the Board of Immigration Appeals, sustaining an exclusion[12] of an alien for a crime committed while he was a citizen, pointed out that it was relying on the "ordinary meaning" of the statutory language and distinguished *Mangaoang* as being based on a statute framed in the present tense.

In brief, the court below has made an unwarranted extension of this Court's narrow holding in *Eichenlaub* and, in so doing, is in conflict with other circuits, with the position elsewhere taken by respondent itself, and with the spirit of this Court's *Fong Haw Tan* rule. It is submitted, therefore, that the concern for "the importance of the issue to American citizenship" which

[12] The exclusion statute, § 212(a)(9) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a)(9), applies to "aliens who have been convicted. . . ."

caused this Court to review *Eichenlaub* argues more strongly for grant of this petition.

2. In its forced construction of § 241(a)(4), the court below is in conflict with the Ninth Circuit in another respect as well. Section 241(b) of the 1952 Act, 8 U.S.C. § 1251(b), provides that § 241(a)(4) shall not apply where the convicting court, at the time of first sentencing "such alien" or within thirty days thereafter, recommends that "such alien" not be deported. The Ninth Circuit held in *Gubbels* v. *Hoy*, 261 F.2d 952, 954 (1958), that § 241(a)(4) must be read in the light of § 241(b), so that Congress must be held to have intended that § 241(a)(4) should not apply to an individual convicted in circumstances making the privilege of § 241(b) "not readily available" to him. The court below lumped the *Gubbels* decision with those of the Ninth Circuit in *Mangaoang* v. *Boyd, supra,* and *Ressurreccion-Talavera* v. *Barber, supra,* as cases unnecessary to discuss, adding that it expressed "no opinion relative to the validity and persuasiveness of the reasoning upon which these decisions are based." R. 132. Actually, however, the decision below conflicts with *Gubbels,* just as we have shown it to conflict with the other two Ninth Circuit opinions. By the language of § 241(b), the privilege afforded by that provision is available only to an alien. Therefore, under *Gubbels,* § 241(a)(4) must be held inapplicable to one not an alien at the time of conviction and sentencing. The court below deprives petitioner of the protection of § 241(b) on a theory of waiver and declares that petitioner, being chargeable with knowledge of his fraudulent naturalization, should and could have applied for a recommendation against deportation at the time he was sentenced. In this respect the court below disagrees

with respondent's Special Inquiry Officer[13] who, in first ordering petitioner's deportation, held that the option to treat petitioner as an alien belonged not to the petitioner, but only to the government and that, until denaturalized by a court at the instance of the government, petitioner was recognized as a citizen for all purposes. R. 57. It is submitted that the cavalier treatment of § 241(b) by the court below justifies review by this Court, especially since that statute has never been interpreted by this Court.

3. Section 19(a) of the Immigration Act of 1917, the predecessor statute of § 241(a)(4), had provided for deportation of aliens "sentenced more than once" for certain crimes. In *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, involving an alien convicted of two counts of murder, this Court construed the statute to apply only if the second crime was committed after imposition of sentence for the first. The stated basis for the Court's decision was the principle that a deportation statute should be interpreted as generously as possible in favor of the alien. And this principle applies, said the Court, even if a less generous construction "might find support in logic." 333 U.S. at 10. To overcome the effect of this decision, the 1952 act, in § 241(a)(4), made deportability hinge upon "convictions . . . regardless of whether . . . in a single trial", rather than upon sentencing. It limited deportability, however, to cases of crimes "not arising out of a single scheme of criminal misconduct . . .". The legislative history of the new statute, beyond evincing an intent to overcome the

[13] See also *United States* v. *Stephan*, 50 F. Supp. 445, 448 (E.D. Mich. 1943).

Fong Haw Tan decision sheds no light on the meaning of the new language.[14]

The Board of Immigration Appeals, treating the new statute as an expression of intent to deport the greatest possible number of twice-convicted aliens, soon began to construe the "single scheme" limitation as narrowly as possible, reading it as if it said "single act or transaction".[15] The earliest judicial expressions on the new statute followed the administrative view. The first was a *dictum* in *Fitzgerald ex rel. Miceli* v. *Landon*, 238 F.2d 864, 865-66 (1st Cir. 1956), that Congress intended to save from deportation only the alien who, "while engaged in a single criminal enterprise, might be guilty of two or more distinct offenses." The same

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[14] S. Rep. No. 1137, H. R. Rep. No. 1365, and Conference Rep. No. 2096, all 82nd Cong., 2d Sess. (1952); see also *Wood* v. *Hoy*, 266 F. 2d 825, 828-29 (9th Cir. 1959), and *Khan* v. *Barber*, 147 F. Supp. 771, 773 (N.D. Cal. 1957).

[15] See cases cited in *Wood* v. *Hoy*, 266 F. 2d at 830, n. 4.; see also Auerbach, *Immigration Laws of the United States* (2d ed., 1961), p. 422:

> "The natural and reasonable meaning of the phrase 'not arising out of a single scheme of criminal misconduct' according to the Board of Immigration Appeals, is that an alien who has performed an act which, in and of itself, constitutes a complete, individual and distinct crime, becomes deportable when he again commits such an act, provided he is convicted of both. The fact that one may follow the other closely, even immediately, in point of time is of no moment. Equally immaterial is the fact that the crimes are similar in character, or that each distinct and separate crime is part of an overall plan of criminal misconduct. Simply because an alien commits a crime and later repeats his offense the conclusion does not follow that the offense is a part of a single scheme, even though the crimes were similar, if each criminal act was a complete and distinct offense for which the alien was convicted."

interpretation was made in *Khan* v. *Barber*, 147 F. Supp. 771, 774 (N.D. Cal. 1957), dealing with convictions of attempted tax evasion in two successive years. The court said:

> "... Congress contemplated nothing more than those situations where an alien's conviction is based on a multiple count indictment charging him with separate crimes, which were committed by the doing of a single act or a series of simultaneous or closely related and closely connected acts."

The Ninth Circuit, in affirming the *Khan* case, adopted the trial court's interpretation of the statute. 253 F.2d 547, 549 (1958), *cert. denied*, 357 U.S. 920.

The first expression of a contrary view was by Judge Herlands in *Jeronimo* v. *Murff*, 157 F.Supp. 808, 815 (S.D. N.Y. 1957). Relying on the principle of *Fong Haw Tan* in holding four distinct and separate larcenies to be crimes arising out of a single scheme of criminal misconduct, the court said:

> "The statute reads: 'not arising out of a single scheme of criminal misconduct.' It does not read: 'not arising out of a single act or single transaction.' The words 'not arising out of' mean not occurring in the course of the performance of the single scheme.
>
> "The statute does not point to any one element of evidence as the vital and all-determining factor. It is necessary to distinguish between one or more evidentiary facts tending to prove or disprove the singleness of the scheme and the ultimate statutory fact. In a particular situation, the circumstance that the defendant committed a number of different crimes at or about one time as the result of the same criminal impulse or on one occasion in the course of the same transaction or episode, may be

probative of the existence of a single scheme. But it does not follow that the existence of the same criminal impulse or the same transaction are indispensable prerequisites to the proof of a single scheme.

"Other evidentiary facts may convincingly establish a single scheme. The initial formulation of the same subsisting fundamental object and purpose; the utilization of precisely the same methods and procedures in each of a series of successive situations to accomplish the original objective; the continuously interacting relationship and activities of the same person who originated and launched the project; the victimizing of the same person through all of the acts—such evidentiary facts may, in the aggregate, demonstrate the existence of a single criminal enterprise, project and undertaking. Such is the case at bar."

Jeronimo was followed by Judge Hoffman in *Zito* v. *Moutal*, 174 F.Supp. 531 (N.D. Ill. 1959), holding two separate tax violations to be crimes arising out of a single scheme.[16]

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[16] The Board of Immigration Appeals had refused to find a "single scheme" where the two crimes are "so separated by time that they constitute individual episodes. . . ." 174 F. Supp. at 536. Replying to the administrative contention that § 241(a)(4) must be read to effectuate the intent of Congress to broaden the class of deportables, the court pointed out that, though eliminating the sentencing requirement, Congress had added the "single scheme" provision as a limitation on deportability and that the administrative interpretation "would . . . violate the well-settled rule that deportation statutes must be construed so as to resolve all doubts in favor of the alien." 174 F. Supp. at 537. The court added:

"To construe the limitation as applying only to a single criminal 'episode' is not only to resolve all doubts against the alien but also to read into the limitation a word which it does not contain. The statute does not include the word 'episode';

Both *Jeronimo* and *Zito* were followed by Judge Timbers in *Barrese* v. *Ryan*, 203 F.Supp. 880 (D. Conn. 1962), in holding successive-year violations of a tax statute to have arisen out of a single scheme. Respondent's "single episode" interpretation was rejected as was also the contention that the statute must be construed to cover the greatest number of twice-convicted aliens. 203 F.Supp. at 887.

The Ninth Circuit, which had followed the administrative interpretation in its 1958 *Khan* decision, reexamined the question the next year in *Wood* v. *Hoy*, 266 F.2d 825 (1959), a case involving conviction of two robberies several days apart. The court, in reversing the deportation order, took occasion to reject specifically both the First Circuit's dictum in *Miceli* and the oft-expressed interpretation of the respondent that "single scheme" means "single act".[17] The court said:

> "We must take the language of the statute as we find it. It says 'not arising out of a single scheme of criminal misconduct'; it does *not* say 'not arising out of a single criminal *act*.' If such latter reading had been the intent of Congress they could have so declared.
>
> "If there is any doubt as to the interpretation of this provision, that doubt must be resolved in

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rather, it uses the phrase 'single scheme of criminal misconduct.' The word 'scheme,' although limited by the word 'single,' is broader than the Board's definition (by example) of the word 'episode.' I conclude that the Board has erroneously interpreted the statute in question, and that the proper interpretation is set forth in the Jeronimo case." *Ibid.*

[17] The Ninth Circuit did not overrule its decision in *Khan*. It is submitted, however, that what it said of *Miceli* and of the administrative decisions applies equally to its own earlier view which had been based on those repudiated authorities.

favor of the alien. [Citing *Fong Haw Tan.*]" 266 F.2d at 830.

The combined impact of *Jeronimo, Zito* and *Wood* caused the Board of Immigration Appeals to reconsider its position in 1959. An alien had been ordered deported for conviction of two false claims of unemployment insurance benefits in successive weeks. The Board of Immigration Appeals, on first consideration, followed its established view and concluded that the crimes did not arise out of a single scheme of criminal misconduct. Upon announcement of the decisions in *Zito* and *Wood,* the Board reconsidered and, taking account of the two new decisions, as well as the *Jeronimo* opinion, reversed itself and held that the two successive false claims, while constituting separate and distinct crimes, arose out of a single scheme of criminal misconduct. *Matter of F—G— and C—D—,* 8 I. & N. Dec. 447 (1959).

Since the decision below, the "single scheme" issue was treated by the Third Circuit in *Sawkow* v. *Immigration and Naturalization Service,* No. 14,048, decided January 29, 1963 (printed in Appendix C hereto, *infra,* p. 59a. The crimes there involved were receipt of a stolen motor vehicle on July 17, 1958, and theft of another vehicle belonging to a different person on July 18, 1958. The court, referring to the *Fong Haw Tan* principle that "any doubt in the interpretation of the statute must be resolved in favor of the alien" and to the rule of *Wood* v. *Hoy* that the burden of proof on the single scheme issue is on the government, held that mere proof of the convictions[18] was insufficient to

[18] In *Sawkow,* as in the instant case, the alien did not testify on the issue.

negate singleness of scheme. The government had argued that proof of "different crimes committed at different times against different persons" supports an inference of separateness of scheme, absent contrary evidence. The court pointed out, however, that, even granting that proposition, the two crimes in question could have been committed within minutes of each other and were, therefore, not shown to have been committed at different times. In the instant case, while the two crimes were technically committed a year apart,[19] they were not committed against different persons.

In the instant case, the court below has gone full circle back to the original administrative interpretation that only crimes committed as a single act or transaction can be said to have arisen out of a single scheme. It finds petitioner to have been convicted of "two separate and distinct crimes." R. 134. It finds: "The acts constituting the conviction of these two crimes are separated by a substantial interval of time." *Ibid.* And it relies heavily on the Ninth Circuit's opinion in *Khan* and the First Circuit's in *Miceli*. *Ibid.* So far

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[19] In *United States* v. *Sullivan*, 98 F. 2d 79, 80 (2d Cir. 1938), the court said with regard to a four-count indictment charging successive-year tax evasions:

> "Indeed, the crimes charged in the indictment describe one course of conduct extending over several years, which results in separate offenses simply because the duty to file a return and pay the tax is one that recurs every twelve months."

It would be legally possible, though administratively undesirable, to put income tax returns on a weekly rather than annual basis. If that were done, each return would still be subject to a separately punishable charge. A case of successive tax evasions, however, would be in no way different from the successive weekly unemployment insurance violations which were held to have arisen from a single scheme of criminal misconduct in *Matter of F—G— and C—D—*, 8 I. & N. Dec. 447 (1959).

as all the contrary prior decisions are concerned, including that of the Ninth Circuit in *Wood* v. *Hoy*, the court below declines to discuss them, beyond saying that it "would not wish . . . to be thought to subscribe to the views expressed in" them. R. 135. It does, however, specifically set forth as a hypothetical situation coming within the statute the set of facts held in *Wood* v. *Hoy* not to come within the statute. R. 136. The court below also adopts the original administrative view that the statute should be interpreted to cover the greatest possible number of twice-convicted aliens. *Ibid.*

The court below has thus given the "single scheme" limitation of § 241(a)(4) an interpretation in conflict with the Ninth Circuit's in *Wood* v. *Hoy*. It is an interpretation, moveover, which violates the principle set forth by this Court in *Fong Haw Tan*. Finally, it reverses a course of administrative progress toward an interpretation comporting with most of the recent judicial expressions and places respondent in a position to select interpretations on a geographic basis. For all these reasons, it is submitted, the situation calls for an authoritative interpretation of the statute by this Court.

4. The court below, while relying on the *Khan* case to support its conclusion that petitioner's successive-year tax evasions did not arise out of a single scheme of criminal misconduct, ignored the Ninth Circuit's statement in *Khan* that such offenses may, in some circumstances, be said to have arisen out of a single scheme. See *Khan* v. *Barber*, 253 F.2d at 549. It further ignored as "wholly immaterial" the fact that the tax case against petitioner was established by the so-called "net worth method." R. 135. There is thus raised the question whether such proof of successive-year tax

evasions, even if it may be held to support conviction of more than one evasion, may also support deportation on the ground of multiple convictions.

In the tax case made against petitioner, there was nothing to show that his evasion of tax in the first of the years for which he was convicted was not in an amount higher than proven by the government and, indeed, high enough to provide a source of the expenditures in the second year which were held to constitute unreported income for that year. See *United States v. Costello*, 221 F.2d 668 (2nd Cir. 1955), *affirmed*, 350 U.S. 359; see also the summation of the prosecutor, R. 99 et seq. Petitioner is not here collaterally attacking the conviction for the second year. He had an option at his trial to explain the circumstances in such a way as to free himself of a second-year conviction by admitting, as to the first year, an even larger evasion than the government had proven. As this Court said in *Holland* v. *United States*, 348 U.S. 121, 138-39, as quoted by the court below in affirming petitioner's tax conviction, 221 F.2d at 671: "Once the Government has established its case, the defendant remains quiet at his peril." It would seem that the Court was justifying the imposition of this disadvantage upon the defendant by the correlative requirement that the government check and negate all relevant leads that might point to possession of a non-taxable source of the expenditures.

That there are inherent imprecisions in this method of assessing tax liability cannot be gainsaid. While this Court approved the use of the imprecise "net-worth" method, it recognized that "unless that increase [in net worth] can be reasonably allocated to the appropriate tax year the taxpayer may be convicted on counts of which he is innocent." *Holland* v. *United States*,

348 U.S. at 129. The Court also noted that "the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute." *Ibid.* It also counselled appellate courts to bear "constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Ibid.* *Holland* involved only one tax year and the liability was proven by an increase in net worth. The hazards deriving from the imprecision of the method are, of course, greatly enhanced where, as in the instant case, evasion is charged in successive years and the liability is proven not by increases in net worth, but rather by expenditures made in those years.

It may well be doubted whether, in such a case, this Court would say that it is for the taxpayer to show in which year he received the income apparently represented by his expenditures and that "he remains quiet at his peril" of being convicted in a separate count for each year in which his expenditures exceeded his reported income. But the question petitioner now raises is a narrower one. If he has taken his risk of not admitting the extent of his unreported income in the first year covered by the indictment, in the hope that he would be acquitted on all counts, but has lost his gamble and has suffered multiple convictions, may the government now treat those convictions, for deportation purposes, as convictions of two or more crimes "not arising out of a single scheme of criminal misconduct"?

It is submitted that, even if the interpretation below of the "single scheme" language of § 241(a)(4) should be deemed unworthy of review by this Court, the application of that interpretation to a case of conviction of

successive counts of tax evasion based on proof of expenditures is a question that should be reviewed. In the light of the Court's admonitions in *Holland* concerning the danger inherent in "net worth" prosecutions, whether so grave a consequence as deportation may be based on the convictions in this case is a matter this Court should rule on.

5. The court below held that the record of conviction of petitioner on two counts of the tax evasion indictment proved not only his conviction of two crimes, but also that the two crimes did not arise out of a single scheme of criminal misconduct. The court said:

> "In the absence of additional facts to support an inference that the two crimes are related we think the Special Inquiry Officer was required to find, as he did, that Costello had been convicted of two crimes 'not arising out of a single scheme of criminal misconduct.'" R. 134

The court was avowedly following, in this connection, the reasoning in *Khan* v. *Barber*, 253 F.2d at 549, where the Ninth Circuit, apparently treating the burden of proof on the "single scheme" issue as being on the alien, said:

> "Fraudulent returns in two different years could, or could not, be one plan or scheme. But we have no facts to prove such a scheme. . . . In the absence of all evidence to the contrary, complete crimes, committed on differing dates or in differing places are considered separate and different crimes, and support separate charges."

This imposition of the burden of proof upon the alien was an error which the Ninth Circuit corrected

a year later when it declared in *Wood* v. *Hoy*, 266 F.2d at 831:

> "It is just as much the burden of the government in order to establish deportability to establish that the two crimes in question did not arise out of a single scheme of criminal misconduct, as it is for the government to establish that the appellant was convicted of 'two crimes.' If it failed to prove either of these facts, appellant was not deportable under the statute."

Wood v. *Hoy* has recently been followed in this respect by the Third Circuit in *Sawkow* v. *Board of Immigration Appeals*, Appendix C, *infra*, p. 59a. See also *Zito* v. *Moutal*, 174 F.Supp. 531, 538 (N.D. Ill. 1959).

By clinging to the Ninth Circuit's reasoning in *Khan*, the court below is in conflict with the later Ninth Circuit decision in *Wood* v. *Hoy* and the recent Third Circuit decision in *Sawkow* v. *Board of Immigration Appeals*. That conflict, relating to burden of proof, a matter of fundamental importance in the administrative process, can only be resolved by this Court.

6. Petitioner submits that, even if he had some burden of proof on the "single scheme" issue, his attempt to sustain it was improperly frustrated by the respondent. The Special Inquiry Officer denied petitioner's application under § 287.4(a) of the Regulations of the Immigration and Naturalization Service, 8 C.F.R. § 287.4(a), for a subpoena calling for the testimony of his defense counsel in the tax evasion trial. No reason was stated for the denial. R. 38. The Board of Immigration Appeals justified the denial in terms of lack of specificity as to the expected testimony. R. 87. The court below, sustaining the denial, said:

> "Any summary by this lawyer of the evidence adduced at the trial or interpretations and speculation by him under the guise of testimony concerning the significance of such evidence or of the maneuvers of counsel would have plainly been completely devoid of probative force. If it was thought that specific portions of the trial transcript or indeed the whole thereof was admissible, the trial transcript or parts thereof, with or without the exhibits received in evidence, should have been offered by Costello at the hearing." R. 133.

The application for subpoena recited that the witness was expected to present evidence that the two tax violations "were not two crimes not arising from a single scheme of criminal misconduct." R. 38. Had the subpoena been granted, petitioner would have sought to obtain from the witness a comprehensible analysis of the tax evasion case which obviously could not be derived, within the compass of a deportation hearing, from a mere perusal of the thousands of pages of evidence in the trial record. The witness might well have given testimony showing that the expenditures on the second of the tax years did not really reflect income for that year. He might have testified to his own strategic decision to contest liability for the entire period of the indictment rather than admit liability for one year in order to prevent a dual conviction. See discussion *supra*, pp. 20-21.

The court below seems to suggest that only a full confession by petitioner could serve to show singleness of scheme, agreeing in this respect with the Special Inquiry Officer who tried to justify his denial of the subpoena on the ground that on the "single scheme" issue petitioner himself was "the best witness on this planet." R. 53. Whether or not the law may properly

require a confession of one tax violation to avoid conviction of two, it would seem that, for deportation purposes, § 241(a)(4), if it imposes any burden at all upon the alien, does not require a confession, but only such evidence as tends to show singleness of scheme. The attorney who handled his defense could obviously present such evidence. Indeed, on such an issue, his testimony would be more significant than petitioner's. See *Barrese* v. *Ryan*, 203 F.Supp. at 884-85.

To impose upon petitioner the burden of proving singleness of scheme while denying him the right to prove it by the proffered witness involves elements of due process which this Court should review.

7. The question whether an attempt to defeat and evade income taxes is a crime involving moral turpitude for deportation purposes has never been ruled on by this Court. In *Jordan* v. *De George*, 341 U.S. 223, the Court held that *conspiracy to defraud the United States* was a crime involving moral turpitude for deportation purposes. In the instant case, the court below, relying on *Jordan* v. *De George*, held petitioner's two convictions of violating § 145(b) of the Internal Revenue Code of 1939 to involve moral turpitude, on the theory that fraud is a necessary ingredient of those crimes.

The question whether fraud is a necessary ingredient of attempted tax evasion was dealt with by this Court in *United States* v. *Scharton*, 285 U.S. 518. The Court there held, with respect to § 1114(b) of the Revenue Act of 1926, 44 Stat. 116, an earlier counterpart of § 145(b), that, for the purpose of the statute of limitations, fraud was *not* a necessary element of the crime. Congress recognized *Scharton* to have decided that "the offense of attempting to defeat and evade income

taxes does not necessarily involve the defrauding or attempting to defraud the United States, fraud not being an essential ingredient of such offense. . . ." H.R. Rep. No. 1492, 72nd Cong., 1st Sess. (1932), p. 29. To overcome the effect of *Scharton*, Congress did not change the law to make fraud an essential ingredient of tax evasion, but rather amended the limitations provision to make the longer period apply to "the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof . . . ." Act of June 6, 1932, c. 209, § 1108, 47 Stat. 288; now incorporated in § 6531 of the Internal Revenue Code of 1954.

Any restriction of the *Scharton* rule—that fraud is not a necessary element of tax evasion—to the narrow statute of limitations issue involved in that case would seem unwarranted. The Department of Justice itself took a much broader view of *Scharton* in arguing, in *Helvering* v. *Mitchell*, 303 U.S. 391, 398, that an acquittal of tax evasion was not *res judicata* of the question of civil liability for tax penalties, because the civil liability was based on fraud, whereas, under *Scharton*, fraud was not in issue in the criminal prosecution.[20] It would seem then, that a decision that petitioner's successive-year tax evasions are deportable offenses, on the theory that they involve fraud as a necessary element, conflicts with *Scharton* and should, on that account, be reviewed by this Court.

To be sure, a crime may involve moral turpitude, quite apart from fraud, as an act of "baseness", "vileness", "depravity", "shameful wickedness" or the

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[20] The Court found it unnecessary, in *Helvering* v. *Mitchell*, to reach the government's contention. 303 U.S. at 398.

like.[21] But, considering how widespread the practice of tax evasion has become, it may be seriously questioned whether the evader, in comparison with other criminals, may properly be called base, vile, depraved, shamefully wicked, etc.[22] Certainly the majority in *Jordan* v. *De George* did not so describe the conspirator to defraud the United States. And, if tax evaders are to be so described for deportation purposes, the serious question of the validity of the deportation statute, which the dissent in *Jordan* v. *De George* discussed but which the majority avoided, would have to be squarely faced.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for petitioner

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[21] See dissenting opinion of Mr. Justice Jackson in *Jordan* v. *De George*, 341 U.S. at 234-38.

[22] See *United States* v. *Carrollo*, 30 F. Supp. 3, 7 (W.D. Mo. 1939).

APPENDIX A

Immigration and Nationality Act of 1952, § 241, 66 Stat. 204, as amended, 8 U.S.C. § 1251:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

"(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

"(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section."

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

June 21, 1962

File: A12 143 440—New York, N. Y.

IN DEPORTATION PROCEEDINGS

In The Matter Of

FRANK COSTELLO (CASTIGLIA)

Respondent

CHARGES:

I & N Act—Section 241(a)(4)—Convicted of two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952).

I & N Act—Section 241(a)(4)—Convicted of crime committed within five years of 1948 entry (tax evasion committed 1949; tax evasion committed 1950; contempt of Congress committed 1951).

I & N Act—Section 241(a)(4)—Convicted two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952; contempt of court 1957).

APPLICATION: Termination of proceedings

IN BEHALF OF RESPONDENT:
Edward Bennett Williams, Esq.
Harold Ungar, Esq., *of Counsel*
1000 Hill Building
839 17th Street, N.W.
Washington 6, D. C.

IN BEHALF OF SERVICE:
Morris Perlovsky
Examining Officer
5th and Chestnut Sts.
Philadelphia 6, Pa.

Decision of the Special Inquiry Officer

According to this record respondent was born in Italy on January 26, 1891; he entered the United States at New York City on April 2, 1895; he departed abroad for a visit and returned to the United States through Houston, Texas, on September 20, 1948; on September 10, 1925, he became a naturalized citizen of the United States; the Federal District Court for the Southern District of New York revoked his citizenship on March 9, 1959 on the ground that it was procured by concealment of a material fact or by wilful misrepresentation; and on February 20, 1961, the Supreme Court of the United States upheld the revocation of United States citizenship on that ground. *Costello* v. *United States*, 365 U.S. 265, 81 S. Ct. 534 (1961).

Counsel for respondent claims that respondent is stateless, and contests the second part of the second allegation of fact in the order to show cause. It is conceded that he is an alien. Whether he is now a national of Italy or of any other foreign country can have no bearing on the three charges of deportability—alienage is the indispensable fact, not present foreign nationality. No finding will be made as to whether he is a citizen of Italy or stateless.

All three charges of deportability are based upon Section 241(a)(4) of the Immigration and Nationality Act, 66 Stat. 204 (1952), 8 U.S.C. 1251(a)(4).[1] The first question to be

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[1] "Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . . is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

resolved is whether respondent was convicted of crimes involving moral turpitude.[2]

Respondent was convicted on April 8, 1952, in the United States District Court, Southern District of New York, for wilfully refusing to answer questions before a United States Senate Special Committee to Investigate Organized Crime in Interstate Commerce, in violation of Title 2, Section 192, United States Code, which reads:

> Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months. (R.S. § 102; June 22, 1938, ch. 594, 52 Stat. 942).

He received a prison sentence of one year on one count and six months on each of two other counts. The contention of the Service that this crime involves moral turpitude

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[2] Although it defies definition, it has been held that the phrase "crime involving moral turpitude" does not render the deportation statute unconstitutional for vagueness. *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951). This wording is deeply rooted in the common law; it has appeared in immigration laws since 1891; and has been applied by judicial interpretation time and again to specific crimes. *Ibid.* The definitions of law dictionaries and some courts which have declared that "moral turpitude" means baseness, vileness, or moral depravity merely offer in substitution for one indefinite expression a multiple choice of three other vague terms. The Congress has never attempted a statutory definition.

is laid at rest by the Supreme Court of the United States in *Sinclair* v. *United States*, 279 U.S. 263, 299 (1929):[3]

> There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved.

This conviction of respondent was appealed to the Court of Appeals for the Second Circuit. *United States* v. *Costello*, 198 F. 2d 200 (2d Cir. 1952). At page 205 the Court held that this charge to the jury was a correct statement of law:

> To find that the defendant acted wilfully you must find that he did not act in good faith when he left the presence of the Committee, or when he refused to give any testimony. A belief on the part of the defendant that he lawfully could act as he did or the fact that he might have been advised by his attorney that he lawfully could act as he did, is no justification for his acts and may not be considered by you in determining whether the defendant acted in good faith.

In other words, evil intent or purpose is not required for conviction under this statute, and it is for this reason that the crime does not involve turpitude. *Ablett* v. *Brownell*, 240 F. 2d 625 (D.C. Cir. 1957).

The Service has cited *Twentieth Century-Fox* v. *Lardner*, 216 F. 2d 844 (9th Cir. 1954), Cert. denied, 348 U.S. 944. Lardner was convicted of contempt of a Congressional Committee. His employment contract permitted its termination by the motion picture producer if Lardner were to "commit an offense involving moral turpitude under Federal, state or local laws or ordinances." The Court said at page 852 that the word "offense" in Lardner's contract

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[3] Oddly, in its brief the Service cited this case in support of its stand that the crime *does* involve turpitude.

may be given a little broader meaning than "crime", and could justify dismissal for conduct that was no legal crime at all. The Court went on to say at page 852:

> It would appear that although the crime, per se, is one not historically infamous or one requiring as an essential element the proof of facts involving moral turpitude, yet the facts of the particular crime of Lardner in refusing under all the circumstances to tell the committee whether he was a Communist should be held moral turpitude as a matter of law—not on the bare record of conviction but on the record of Lardner's actions before the congressional committee which had led to his conviction in the district court in Washington, D. C.

The Court at page 851 stressed that "This being a California contract, California decisions would govern." The Court took cognizance of the Sinclair case as "authority for the proposition that moral turpitude is not an essential element of the crime," but then added, "That is not to say that the circumstances of the commission of the crime may not be saturated with moral turpitude." The "circumstances" were contained in "a complete transcript and pictorial record of the performance before Congress."

The issue in the Lardner case was whether he committed an offense involving moral turpitude. A contract of employment was at stake,—not deportation. The term "offense" was construed to be broad enough to include conduct that was not even a crime. The Court recognized that the crime of contempt of Congress was not, per se, morally turpitudinous but permitted inquiry into circumstances aliunde the record of conviction. Such inquiry is forbidden in deportation hearings. This factor clearly distinguishes Lardner from the case at hand. It was aptly put in *United States ex rel. Zaffarano* v. *Corsi*, 63 F. 2d 757, 759 (2d Cir. 1933):

> . . . neither the immigration officials nor the court reviewing their decision may go outside the record of

> conviction to determine whether in the particular instance the alien's conduct was immoral. And by the record of conviction we mean the charge (indictment), plea, verdict, and sentence. The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted.

In *United States ex rel. Robinson* v. *Day*, 51 F. 2d 1022 (2d Cir. 1931), the Court said at page 1022:

> when by its definition (the crime) does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral . . . Conversely, when it does, no evidence is competent that he was in fact blameless.

For deportation purposes, conviction for contempt of Congress is not a crime involving moral turpitude.

Allegation of fact number 13 claims that respondent was convicted on May 7, 1957, in the Court of General Sessions of the County of New York, N. Y., of criminal contempt of court due to refusal to answer questions of the Grand Jury of the County of New York, N. Y. Exhibit number 14 in the record of deportation proceedings shows that Costello was adjudged guilty of criminal contempt of court following a summary proceeding. He was ordered committed to the Workhouse for a term of thirty days. Costello was punished under New York Judiciary Law, Section 750 A (5), Power of courts to punish for criminal contempts.[4] He was not convicted under the New York Penal Law, Section 600(6), Criminal Contempt.[5] "The two proceedings

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[4] "A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others: . . . contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory . . . "

[5] "A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor: . . . Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory. . . "

are wholly independent of each other" and the law "contemplates that both remedies, or either may be pursued". *Sherwin* v. *Mead*, 92 N.Y. 415, 420 (1883). The procedure under New York Judiciary Law "is not a criminal prosecution"; and conviction in a criminal action will not bar later punishment by summary proceeding since there is no violation of the constitutional provision that no person shall be subject to be twice put in jeopardy for the same offense. *Hanbury* v. *Benedict*, 146 N.Y.S. 44, 47 (1914).

Myers v. *United States*, 264 U.S. 95, 104-105 (1924) distinguishes between "proceedings for contempt" and "criminal prosecution":

> While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not "criminal prosecutions" within the Sixth Amendment or common understanding.

The New York Penal Law itself draws this distinction in Section 601 when it states, "A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court." Section 602 states, "Punishment for a contempt, as prescribed in article nineteen of the judiciary law, does not bar an indictment for the same offense." At page 103 in the Myers case, supra, the court declares that contempt proceedings "are *sui generis*—neither civil actions nor prosecutions for offenses". Courts having no criminal jurisdiction may nevertheless punish for criminal contempt. *In re Debs*, 158 U.S. 564 (1895); *Bessette* v. *Conkey*, 194 U.S. 324 (1904). The state statutory law and judicial authority leave no doubt that for the purposes of the deportation statute Costello was not *convicted of a crime* when he was adjudged guilty of criminal contempt in a summary proceeding under New York judiciary law.

Exhibits 10 and 11 show that respondent was convicted in the United States District Court for the Southern Dis-

trict of New York on May 17, 1954, for the offense of wilfully and knowingly attempting to defeat and evade federal income tax by filing false and fraudulent income tax returns. Costello was convicted on two counts, the first relating to a tax return filed on or about January 14, 1949, for the calendar year 1948, and the other count relating to a tax return filed on or about March 10, 1950, for the calendar year 1949. This conviction arose under Section 145(b) of Title 26, United States Code.[6] The sentence was five years on each count, to run concurrently, and a fine was imposed. Since fraudulent conduct is an essential ingredient, this crime involves moral turpitude. *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951); *Chu* v. *Cornell*, 247 F.2d 929 (9th Cir. 1957), Cert. denied 355 U.S. 892; *United States* v. *Scharton*, 285 U.S. 518 (1932); *Bloch* v. *United States*, 221 F.2d 786 (9th Cir. 1955); *Khan* v. *Barber*, 253 F.2d 547 (9th Cir. 1958), Cert. denied 357 U.S. 920.

In addition to establishing that respondent was convicted of two crimes involving moral turpitude, the Service must also show that the crimes did not arise "out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial".

Khan v. *Barber, supra,* dealt with a two count indictment charging the defendant with violation of Section 145(b) of Title 26, United States Code for wilfully attempting to defeat and evade federal income taxes for the years 1946

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[6] Title 26, U.S.C. Section 145(b), 1939 Code, provides: "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

and 1947 by filing two separate false and fraudulent tax returns. The Court of Appeals for the Ninth Circuit said that fraudulent tax returns in two successive years could, or could not, be one plan or scheme; and held that the records of conviction were sufficient to establish that the crimes were unrelated and did not arise out of a single scheme of criminal misconduct, in the absence of facts proving that a single scheme did exist. These are precisely the facts in the case at hand,—we have two counts charging Costello with attempted evasion of federal income taxes for two successive years by filing two separate false returns. The Service has presented the record of these convictions. Costello has not offered his testimony, but has presented the prosecuting attorney's summation on behalf of the Government in the tax case (Exhibit 15). What the prosecutor says at one point is, "If the Frank Costellos can get away with this scheme to defeat and defraud the Government out of income taxes, then the honest taxpayers of this country will break their backs carrying the load for these easy money Costellos".

The criminal case did not require that the prosecution prove that a single scheme existed, and the use of the word "scheme" in the summation was not a claim that both crimes arose out of a single scheme,—it was undoubtedly intended to mean that Costello's conduct was wilful in that he deliberately schemed or planned each offense. The summation deals basically with Costello's alleged methods of hiding income and assets. The examining officer, acting as the representative of the Service, offered in evidence an affidavit of Costello in support of motion for inspection of the minutes of the Grand Jury which returned the tax indictments (Exhibit 18). In the affidavit Costello asserts that "your deponent filed Federal Income Tax Returns which truly and accurately reflect all of his income for the said years and your deponent paid in full all taxes due thereon". The examining officer also presented the summation of defense counsel (Exhibit 17), and the testimony

of a defense witness, Alfred E. Sweeney, a public accountant (Exhibit 19). In my view, Exhibits 15, 17, 18, and 19 do not offer any probative evidence tending to establish that a single scheme of criminal misconduct either (1) did exist or (2) did not exist.

In my opinion, the rule laid down in the Khan case is that the record of conviction of two counts of attempted federal income tax evasion for two successive years, by filing two separate false returns, suffices to establish that respondent's crimes were unrelated and did not arise out of a single scheme, in the absence of probative evidence that a single scheme did exist.

Counsel for respondent has cited *Wood* v. *Hoy*, 266 F.2d 825 (9th Cir. 1959); *Zito* v. *Moutal*, 174 F.Supp. 531 (N.D. Ill. 1959); *Jeronimo* v. *Murff*, 157 F.Supp. 808 (S.D. N.Y. 1957). These three cases are distinguishable from the Khan case. Wood testified that he and another person had entered into an agreement about two or three weeks beforehand to rob (1) a certain liquor store and (2) a certain theatre; and they carried out this scheme, which resulted in Wood's convictions. The Service offered no evidence other than the records of conviction. In *Zito*, the Government merely introduced the record of conviction; the indictment charged a continuing conspiracy to commit offenses of the same type; in each case the victim was the same; the same defendants participated in the offenses; and the offenses allegedly occurred approximately nine days apart. Jeronimo was convicted of (1) conspiracy to commit bribery and larceny; (2) bribery; and (3) larceny. The Service rested upon the records of conviction. The Court held that all of the acts and transactions alleged in the single indictment were connected together and that all of such acts and transactions were in furtherance of the same conspiracy and constituted part of a common scheme and plan.

In other words, Wood's testimony that he had entered into a single scheme to commit the two robberies overcame

the record of conviction which, standing alone, could have carried the burden of establishing that there was no single scheme. In *Zito* and *Jeronimo*, the record of conviction, *per se*, did not suffice to show that the offenses were so unrelated that they did not arise out of a single scheme,—in fact, the indictment in *Jeronimo* clearly alleged a single scheme; and in *Zito* the Court said that the charges in the indictment gave equal support to a finding either way, which meant that the Government had failed to carry its onus.

Another case cited by counsel is *Miceli* v. *Landon*, 238 F.2d 864 (1st Cir. 1956). Here the Court upheld the finding that a single scheme did not exist. The entire record of the deportation hearing was not available to the Court. The opinion discusses the crimes involved, and concludes that the evidence of record "might well have been adequate to sustain the finding that the two offenses of which Miceli was convicted did not arise 'out of a single scheme of criminal misconduct' ". While we do not know what the Service presented at the deportation hearing of Miceli, the Court based its opinion on the conviction record, and we do know that in the *Kahn*, *Wood*, *Zito*, and *Jeronimo* cases the Service relied solely upon the records of conviction. In the instant case, the Service is also resting on the conviction record. Thus it becomes apparent that the same principles of law are applied in *Wood*, *Zito*, *Miceli*, *Khan*, and *Jeronimo*. In each instance, the burden of proof is regarded as resting upon the Service. In each case, the discussion makes it plain that such burden can be carried by the record of conviction *per se;* and certainly this is reasonable, for the Service is required to prove not only a negative, but probably, in most instances, a *negative state of mind* of one person,—the respondent—during an indefinite period of time prior to the first of at least two crimes. Such a ponderous burden would have rendered the deportation statute well-nigh meaningless unless the Courts had adopted this rule. On the basis of the judicial

decisions (and the facts in this regard are identical to *Khan*), it is found that the record of convictions suffices to establish that the two tax crimes did not arise out of a single scheme of criminal misconduct.

It is appropriate to take note of Costello's failure to offer his testimony on the issue of single scheme. Counsel for respondent requested the issuance of a subpoena for one Fennelly, an attorney who represented Costello at his tax trial. Counsel asserted that this person could offer evidence pertinent to the single scheme issue. Counsel admitted that the witness did not participate in the crimes but asserted that he had "knowledge of the facts". Here we are presented with a situation where counsel has the best witness on this planet seated next to him,—the respondent—yet he seeks a subpoena for someone else, a person not involved in the crimes, to speak on the question as to whether the crimes arose out of a single scheme of criminal misconduct. The request for subpoena was denied; later, counsel asked leave to submit affidavits from this person and another; this request was granted; but no affidavits were submitted. It is permissible to draw an adverse inference from this silence of Costello who, after all, is peculiarly in possession of information as to whether or not his crimes arose out of a single scheme. Being in possession of the facts and yet failing to come forward, the silence of respondent may be regarded as evidence of the most persuasive character. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923). However, I deem this inference unnecessary because it is my finding that the conviction record, in and of itself, establishes that the crimes did not arise out of a single scheme of criminal misconduct. *Khan* v. *Barber*, *supra*. This finding is totally independent of any inference which can be drawn from Costello's silence.

The second charge of deportability is keyed to respondent's 1948 return to the United States, charging him with convictions for crimes committed within five years after

entry on September 20, 1948, for which there was a sentence to confinement for a year or more. The three crimes are the two tax violations and the contempt of Congress. Counsel for respondent contends that since Costello was holding a certificate of naturalization at the time of his return to this country in 1948 he cannot be regarded as having then effected an "entry". *United States ex rel. Brancato* v. *Lehmann*, 239 F.2d 663 (6th Cir. 1956) is directly in point. Brancato first entered the United States in 1914; he was naturalized in 1929; then left the United States and reentered in 1930; was convicted of a crime involving moral turpitude in 1932; and was denaturalized in 1939. The question was whether he was deportable for conviction of a crime committed within five years after the 1930 return. The Court held that since Brancato did not come into the United States as an alien, he did not make an "entry" in 1930. The decision recognized that the judgment of denaturalization nullified the order of naturalization *ab initio*, but the Court refused to treat Brancato as if he were an alien in 1930 when factually he was a citizen with a legally issued United States passport.

The term "entry" did not have a statutory definition until the Immigration and Nationality Act of 1952. Section 101(a)(13) of that Act, 8 U.S.C. 1101(a) limits "entry" to "any coming of an alien into the United States". Under the second part of Section 241(a)(4), it is necessary to establish that respondent is now an alien; that he was in actuality an alien at the time of an entry preceding the convictions, *Brancato* v. *Lehmann, supra;* but it is not necessary to show that he was an alien at the time of his convictions, *United States ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521 (1950); *Resurreccion-Talavera* v. *Barber*, 231 F.2d 524 (9th Cir. 1956). Any entry, whether it is the first coming or a subsequent one, may be used as the basis of deportability. *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422 (1933). Since the 1948 return is not deemed an entry, this record establishes only one entry

into the United States, on April 2, 1895. In *Eichenlaub*, the Supreme Court ruled that the pertinent section of law did not specify a requirement of alien status when convicted; and stated that it was not necessary to give a retroactive effect to the denaturalization.

Costello was denaturalized under Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, as amended 68 Stat. 1232; 8 U.S.C. 1451, which gives retroactive effect to his denaturalization, stating that "such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate". In *Eichenlaub*, the Court opined at page 532 that the law did not intend to preclude the Government from deporting alien offenders merely because they were convicted at times when they held certificates of naturalization later canceled for fraud. The highest tribunal then asserted that a contrary interpretation "would permit the denaturalized aliens to set up a canceled fraudulent status as a defense, and successfully to claim benefits and advantages under it". It is my conclusion that the retroactive effect of Costello's denaturalization, specified in the statute, confers upon him an alien status at all times and for all purposes, except where the language of the Congress is deemed to have spoken otherwise. *Brancato* has held that the Congressional definition of "entry" requires coexistence of actual alienage and coming into the United States; under the holding in *Mangaoang* v. *Boyd*, 205 F.2d 553 (9th Cir. 1953), Cert. denied 346 U.S. 876, the language of the legislators demands coexistence of alienage and subversive conduct for deportability under Section 241(a)(6) of the Immigration and Nationality Act, formerly Section 4(g) of the Act of October 16, 1918, 8 U.S.C. 137, as amended by Section 22 of the Subversive Activities Control Act of 1950. These are the only exceptions. *Mangaoang* did not involve denaturalization; it concerned a Filipino who came to the United States in 1926 at a time when he was a national; he was a member of the

Communist Party from 1938 to 1939; the Philippine Independence Act of July 4, 1946, rendered him an alien on that date. The Court held that he was not deportable under the Internal Security Act of 1950 because (1) he did not effect an entry in 1926 because he was not then an alien and (2) he was not simultaneously an alien and a member of the Communist Party.

Counsel hints that *Eichenlaub* might not be followed if the same case came before the Supreme Court now. That is pure conjecture. On the other hand, we do not know if the *Brancato* decision would be accepted by the Supreme Court.

Counsel has pointed to *Rosenberg* v. *United States*, 60 F.2d 475 (3rd Cir. 1932), Cert. denied 287 U.S. 645, as authority for the proposition that the "relation back" theory (deeming a denaturalized person as having been an alien *ab initio*) should be applied only where the naturalizing court lacked jurisdiction to naturalize the subject. Rosenberg did not meet the residence requirement which was necessary to confer jurisdiction on the court. Although *Rosenberg* happened to involve lack of jurisdiction for residence, this is not the *sine qua non* for application of the relation back theory. In fact, Rosenberg was denaturalized not only on the jurisdictional ground but also for fraud. Counsel feels that *Rosenberg* is the leading authority for the "notion that illegally procured citizenship may be disregarded nunc pro tunc", as he remarks in his brief at page 8. That point was not in issue in that case, nor in *Johannessen* v. *United States*, 225 U.S. 227 (1912); nor *United States* v. *Spohrer*, 175 F. 440 (C.C.D., N.J. 1910), also cited by counsel. Costello's denaturalization, pursuant to Section 340(a) of the Immigration and Nationality Act, carries with it the statutory declaration that it is retroactive.

Counsel has mentioned that *United States* v. *Stephan*, 50 F. Supp. 445 (E.D. Mich. 1943) demonstrates that "an illegal naturalization is not a nullity for all purposes".

Stephan obtained citizenship in 1935 by fraud; he was found guilty of treason in 1942. He argued that since his naturalization was subject to revocation for fraud, upon a proceeding instituted by the Government, he should be deemed an alien retroactively and therefore incapable of having committed treason. The naturalization had not been revoked. The Court declared at page 448:

> It is self-evident that fraud in procuring the order of naturalization, although a ground for its cancellation, does not render it void but only voidable; and that until such time as his citizenship is revoked, such fraud does not lessen his obligations and duties to this country or relieve him of the solemn undertakings he made in his oath of allegiance.

All this case holds is that unless and until the individual is denaturalized by a court, he is still recognized as a citizen for all purposes. The Government had its choice of prosecuting for treason or bringing an action to denaturalize. It chose the former. Stephan was not in a position to declare himself denaturalized for fraud,—only a competent court could do so.

Counsel's citation of *Cepo* v. *Brownell*, 147 F. Supp. 517 (N.D. Cal. 1957) turns upon a denaturalization under Section 15 of the Act of June 29, 1906, 34 Stat. 601, U.S.C. 405 (1934 Ed.). This law did not specify that denaturalization was to be given a retroactive effect,—Section 340(a) of the 1952 Act under which Costello's citizenship was set aside does specify such effect. In addition, *Cepo* is outweighed by authority to the contrary cited in *In re Naturalization of Estevez*, 189 F. Supp. 705, 709 (E.D. Pa. 1960). Further, *Cepo* deals not with the denaturalized person but with those claiming derived or acquired citizenship flowing from the denaturalized person. Section 340 of the 1952 Act now spells out the status of claimants of such rights when the principal is denaturalized.

In this connection, counsel for respondent has cited *Gubbels* v. *Hoy*, 261 F.2d 952 (9th Cir. 1958). Gubbels

was convicted by a court-martial in Germany while serving with the American armed forces. The Court ruled against deportability under Section 241(a)(4) of the Immigration and Nationality Act because of the qualifying provisions of Section 241(b). The latter section wipes out the applicability of Section 241(a)(4) where (1) there has been a pardon of the pertinent crimes by the President or a Governor or (2) the court sentencing the alien makes, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation against deportation. *Gubbels* turned on the narrow point as to whether a court-martial should be regarded as a "court" within the contemplation of Congress in enacting Section 241(a)(4). This decision held that a court-martial could not have been contemplated, when considering Section 241(a)(4) in conjunction with Section 241(b), since (b)(2) could be a practical impossibility in such cases because of time lag; all of the Constitutional guarantees may not be invoked in "cases arising in the land or naval forces"; and Section 241(b) speaks of "prosecution authorities", hardly an apt description of the military authorities. In sum, the tribunal felt that the individual convicted by court-martial was deprived of an important right or privilege which the Congress had intended to be available for all who came within Section 241(a)(4). *Gubbels* is an isolated case and turns on a narrow, specific point. I see no reason to extend its impact to the instant case. Costello was prosecuted and convicted in a civilian, not a military, court. He had the benefit of all of the Constitutional guarantees. He was convicted in the United States, not abroad. And he is still protected by Section 241(b)(1) of the Immigration and Nationality Act which can eradicate his deportable status upon his receipt of a pardon as described in that section. Gubbles was unable to take advantage of Section 241(b)(2) because of a situation not of his own doing, whereas Costello's inability to derive the benefits of a recommendation against deportation was the creature of his own fraud.

During the deportation hearing counsel for respondent protested the fact that the Government sought to deport Costello on the basis of criminal convictions which he claimed were obtained in violation of respondent's legal and Constitutional rights. He specified that the evidence leading to the convictions resulted from wire tapping and from violation of the federal mail statutes. I cannot yield to counsel, for it is a long established principle that where a court had jurisdiction of the person and the subject matter, its judgment of conviction is impregnable to collateral attack. *Bowen* v. *Johnston*, 306 U.S. 19 (1939); *Bowles* v. *Laws*, 45 F.2d 669 (D.C. Cir. 1930), Cert. denied 283 U.S. 841; *In re Tinkoff*, 95 F.2d 651 (7th Cir. 1938), Cert. denied 304 U.S. 573; *Cocke, for the use of the Commercial Bank of Columbus, Mississippi* v. *Halsey*, 41 U.S. 70 (1842).

To sum up, it has here been found that Costello did not effect an entry in 1948. Thus, the second charge of deportability falls. The first and third charges of deportability are the same except that the third contains the additional item of contempt of court. It has been determined above that respondent's being adjudged guilty of contempt of court in a summary proceeding under the New York Judiciary Law did not constitute *conviction of a crime*. Since this would have the effect of reducing the third charge to the same language as in the first charge, the third charge will be dismissed. This leaves the first, which is based upon the two tax convictions and the contempt of Congress conviction. Since it was here found that the contempt offense did not involve moral turpitude, we are left with the two tax crimes. Determination has here been made that the two tax convictions involved crimes involving moral turpitude; that they did not arise out of a single scheme of criminal misconduct; and that Section 241 (a)(4) of the Immigration and Nationality Act requires deportation where the convictions occurred during a period when Costello held a certificate of naturalization which he had obtained by fraud, and which was later revoked.

retroactively. I conclude that on the basis of this record respondent is deportable on the first charge, based solely on the two tax convictions.

It is noted that respondent has a United States citizen wife, that he has resided in this country since 1895, and that he is 70 years old. In order to qualify for any relief from deportation he must show good moral character for at least the past ten years. Suspension of deportation pursuant to Section 244(a)(5) of the 1952 Act, 8 U.S.C. 1254(a)(5), as well as voluntary departure under Section 244(e), 8 U.S.C. 1254(a)(e) [which must be read in conjunction with Section 244(a)(5)] imposes this requirement. Respondent is unable to show good moral character during the requisite period because of his tax convictions. He is also statutorily barred from any relief from deportation by Section 101(f)(7) of the Act, 8 U.S.C. 1101(f)(7), because he has been confined, due to convictions, to a penal institution for an aggregate of at least 180 days. These deportation proceedings were held at the United States Penitentiary, Atlanta, Georgia, on May 23, 1961, while respondent was still serving his five- year sentence on the tax convictions. He is also ineligible for relief because he has not "been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or assumption of a status, constituting a ground for deportation", as required by Section 244(a)(5). Respondent's deportability arose when he was convicted of the tax violations in 1954.

The only application for relief from deportation made during the deportation hearing was counsel's motion that these proceedings be dismissed or terminated for failure of the Government to establish deportability. The Government has demonstrated deportability on the first charge by reasonable, substantial, and probative evidence, as required by Section 242(b)(4) of the Immigration and Nationality Act, 8 U.S.C. 1252(b)(4), and the motion of respondent is denied and an order of deportation will be

entered. Respondent was given the opportunity to specify the country to which he would prefer to go if deported, and he declined to do so.

Upon the basis of this record, the following are my findings of fact:

1. The first allegation of fact in the order to show cause is adopted as my first finding of fact;

2. You are a native of Italy;

3. The third allegation is adopted as my third finding of fact;

4. You returned to the United States at Houston, Texas, on September 20, 1948;

As to (5), (6), (7), (8), (9), (10), (11), (12), these allegations of fact are adopted as my findings of fact;

13. You were adjudged guilty of criminal contempt of court in a summary proceeding on May 7, 1957, at the Court of General Sessions of the County of New York, N. Y., pursuant to New York Judiciary Law, for which you were ordered committed to the Workhouse for thirty days;

14. The crimes named in (8) and (9) involve moral turpitude;

15. The crimes named in (8) and (9) did not arise out of a single scheme of criminal misconduct;

16. The crime named in (11) does not involve moral turpitude;

17. The facts stated in finding (13) do not constitute a conviction of a crime.

Upon the basis of these findings of fact, these are my conclusions of law:

(1) That you are deportable from the United States under Section 241(a)(4) of the Immigration and Na-

tionality Act, in that after entry you have been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to wit: (1) wilfully and knowingly attempting to defeat and evade income tax due the United States Government for the year 1948 by filing a false and fraudulent income tax return on or about January 14, 1949, and (2) wilfully and knowingly attempting to defeat and evade income tax due the United States Government for the year 1949 by filing a false and fraudulent income tax return on or about March 10, 1950, both in violation of section 145(b) of Title 26, United States Code.

(2) That you are not deportable under Section 241(a)(4) of the Immigration and Nationality Act in that you have been convicted of crime committed within five years of your 1948 entry (tax evasion committed 1949; tax evasion committed 1950; contempt of Congress committed 1951).

(3) That you are not deportable under Section 241(a)(4) of the Immigration and Nationality Act based on conviction for two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952; contempt of court 1957).

ORDER: IT IS ORDERED that respondent's motion to terminate these proceedings be, and the same is hereby, denied.

IT IS FURTHER ORDERED that respondent be deported from the United States in the manner provided by law on the first charge of deportability based solely on the income tax convictions.

ABRAHAM GOLD
Abraham Gold
Special Inquiry Officer

Decision and Order of Board of Immigration Appeals

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

January 2, 1962

File: A-12143440—New York

In re: FRANK COSTELLO (CASTIGLIA)

IN DEPORTATION PROCEEDINGS APPEAL

ORAL ARGUMENT: October 2, 1961

On behalf of respondent: Edward Bennett Williams, Esq., 1000 Hill Building, 839-17th Street, N. W., Washington 6, D. C.

Also present: Harold Ungar, Esq., 1000 Hill Building, 839 - 17th Street, N. W., Washington 6, D. C.

(Alien also present)

On behalf of I&N Service: Irving A. Appleman, Esq.

CHARGES:

Order: Sec. 241(a)(4), I&N Act (8 USC 1251(a)(4))—Convicted of two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952)

Sec. 241(a)(4), I&N Act (8 USC 1251(a)(4))—Convicted of crime committed within five years of 1948 entry (tax evasion committed 1949; tax evasion committed 1950; contempt of Congress committed 1951)

Sec. 241(a)(4), I&N Act (8 USC 1251(a)(4))—Convicted of two crimes after entry (tax evasion 1954; tax evasion 1954; contempt of Congress 1952; contempt of court 1957)

Lodged: None

APPLICATION: Termination of proceedings

This is an appeal from the order of the special inquiry officer requiring the respondent's deportation on the first charge set forth above on the basis of the convictions in 1954 for tax evasion. The appeal will be dismissed.

The respondent, a 70-year-old married male, a native of Italy, concedes that he is an alien. These events are relevant. The respondent entered as an alien in 1895. He was naturalized in 1925. He returned from Mexico to the United States in 1948. He has the following convictions: contempt of Congress in 1952, tax evasion in 1954 (two counts), and contempt of court in 1957. His naturalization was revoked in 1959.

Deportation on the first charge is sought under that portion of Section 241(a)(4) of the Immigration and Nationality Act (8 USC 1251(a)(4) which provides:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

Deportation was ordered on the basis of the tax convictions. The issues are whether these convictions, to constitute grounds for deportation, had to occur while the respondent was an alien, whether the convictions were for crimes involving moral turpitude, and whether they arose out of a single scheme.

THE TAX CONVICTIONS AND ALIENAGE.

This discussion is concerned with one who is an alien but who in the past was a citizen and while a citizen was convicted of crime.

We believe that the precedents hold that if the condition which is basis for deportation (e.g., conviction of crimes) is one which could occur to either an alien or a citizen, then the nationality status of the individual at the time the condition arose is immaterial. We believe that the basis for deportation here is a condition which could have occurred to either an alien or a citizen. We conclude that the nationality status of the respondent at that time was immaterial. The precedents fall into two categories. In the first are the cases decided on the basis of the fact that the ground of deportation is related to the making of an entry and that by definition only an alien can make an entry; therefore, a person who was not an alien at the time he came to the United States, had not made an entry and there was no need to consider whether he had to be an alien later when the deportable ground arose. If, however, the individual was an alien at the time of entry or if alienage at the time of entry is not a factor because the ground of deportation is not related to an entry, the issue as to the necessity of the coexistence of alienage and the occurrence of the ground of deportation requires decision, but no defined term dictates the answer.[1]

In the situation before us, alienage at the time of entry in 1895 is conceded.[2] The situation before us is one concerned not with alienage and entry but with the coexistence of alienage and the emergence of the ground of deportation. Before we consider this group of cases we shall consider the group which concerned entry since counsel relies upon

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[1] In addition to grounds of deportation where alienage is required because an entry is involved is the ground which by its nature can be met only by one who is an alien (*e.g.*, failure to register as an alien, failure to maintain status as nonimmigrant (Sections 241(a)(5) and (9) of the Act, 8 USC 1251)), but we are not concerned with such a ground.

[2] It is proper to use the first entry. (*Banez* v. *Boyd*, 236 F. 2d 934, C.A. 9 (1956); *U. S. ex rel. Beltrage* v. *Kenton*, 131 F. Supp. 576, aff'd 224 F. 2d 803, C.A. 2 (1955)).

such cases. The cases concerned with alienage at the time of entry are *Barber* v. *Gonzales*, 347 U.S. 637 (1954) and *U. S. ex rel. Brancato* v. *Lehmann*, 239 F.2d 663, C.A. 6 (1956). Gonzales, a native of the Philippines, was a national of the United States from the time of his birth until 1946 when he became an alien. He resided in the United States continuously from his admission in 1930. Convicted of crimes in 1941 and in 1950, he was ordered deported in 1951 under that portion of Section 19(a) of the Immigration Act of 1917 (39 Stat. 889, as amended, formerly 8 USC 155(a)) which called for the deportation of an alien "who is hereafter [May 1, 1917] sentenced more than once . . . because of conviction in this country of any crime involving moral turpitude, committed at any time after entry." An entry can be made only by an alien who has voluntarily come from a foreign port. Gonzales contended that he had made no entry for he had come neither as an alien nor from a foreign port; he had come as a national from an insular possession to the mainland. The Service contended that he should be considered as if he had been an alien coming from a foreign port because from 1934 to 1946, the law provided that for the purpose of the immigration laws, Filipinos were "considered as if they were aliens." The court ruled that Gonzales was not deportable. The Court held that until 1934 the Philippines could not be regarded as foreign, that Gonzales had not arrived from foreign, and that there was, therefore, no entry. The Court would not consider Gonzales as if he had made an entry as an alien. This disposition of the case made it unnecessary for the Court to rule on the contention that Gonzales had not been an alien in 1941 at the time of conviction.

Brancato concerned a native of Italy who had entered the United States as an alien in 1914. Naturalized in 1929, he had returned from a foreign visit in 1930 and had been convicted of a crime in 1932. He was denaturalized in 1939. Deportation was ordered under that portion of Section 19(a) of the Immigration Act of February 5, 1917,

as amended (39 Stat. 889, as amended, formerly 8 USC 155(a)) which required the deportation of an alien "who is hereafter [May 1, 1917] sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States." The district court found that Brancato had been properly ordered deported. The district court held that the denaturalization was retroactive making Brancato an alien at the time of conviction. As an additional authority, the court cited *U. S. ex rel. Eichenlaub* v. *Shaughnessy*, 338 U.S. 521 (1950) (discussed in detail later). Upon appeal, the circuit court (one judge dissenting) reversed the district court on the ground that the law required an entry and since an entry could be made only by an alien, the law did not apply to Brancato who had entered as a citizen. Despite the denaturalization, the circuit court refused to indulge in the fiction that Brancato had been an alien at the time of entry. It went on to state that Eichenlaub was not applicable to the "general deportation statute" (Immigration Act of February 5, 1917) which the court was considering.

Passing from the cases which turn on the connection between "entry" and alienage, we come to those concerned with whether alienage must have existed when the deportable ground arose. *U. S. ex rel Eichenlaub* v. *Shaughnessy* (and *U. S. ex rel. Willumeit* v. *Shaughnessy*), 338 U.S. 521 (1950) (4-to-3 decision) concerned two aliens found to be undesirable residents of the United States whose deportation had been ordered under the Act of May 10, 1920 which in pertinent part provided:

> That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall [if found undesirable residents] • • • be • • • deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917:

> All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate * * * [The Espionage Act of June 15, 1917, as amended].

Eichenlaub, a native of Germany, became a citizen of the United States in 1936. In 1941, he was convicted for violation of the Espionage Act of 1917. In 1944, his citizenship was cancelled on the ground of fraud in its procurement. Willumeit was naturalized in 1931. In 1942, he was convicted of conspiracy to violate the Espionage Act of 1917. In 1914, his naturalization was cancelled on the ground of fraud in its procurement.

The Court found the substantial issue was whether the law required the individuals involved to have been aliens at the time they were convicted. Refusing to decide whether a retroactive effect should be given to the denaturalization orders, the Court stated:

> A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized. The convictions of the relators for designated offenses are important conditions precedent to their being found to be undesirable residents. Their status as aliens is a necessary further condition of their deportability. When both conditions are met and, after hearing, the Attorney General finds them to be undesirable residents of the United States, the Act is satisfied.
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> The recognized purpose of the Act was deportation. It is difficult to imagine a reason which would have made it natural or appropriate for Congress to authorize the Attorney General to pass upon the undesirability and deportability of an alien, never naturalized, who had been convicted of espionage, but

would prohibit the Attorney General from passing upon the undesirability and deportability of aliens, such as the relators in the instant cases, who had procured certificates of naturalization before their convictions of espionage, but later had been deprived of those certificates on the ground of fraud in their procurement. If there were to be a distinction made in favor of any aliens because they were at one time naturalized citizens, the logical time at which that status would be important would be the time of the *commission* of the crimes, rather than the purely fortuitous time of their *conviction* of those crimes. Not even such a distinction finds support in the statute.

The Court pointed out the failure of Congress to make a distinction between aliens who had never been naturalized and those who had lost United States citizenship was not the result of unfamiliarity with such matters.

The dissenting opinion stated that the statute permitting the deportation of an alien should be read to apply only to the person who had been an alien when convicted. It pointed out that since the statute permitted either of the two constructions without violence to language, the construction which led to hardship should be rejected. Its review of the Congresisonal history failed to reveal that Congress had denaturalized citizens in mind when the law was passed.

Mangaoang v. *Boyd*, 205 F. 2d 553, C.A. 9 (1953), cert. den. 346 U.S. 876, concerned a native of the Philippines who resided continuously in the United States from his admission in 1926. He was a national of the United States from birth until 1946 when he became an alien. He had been a member of the Communist Party from 1938 to 1939. The membership was the basis for an order of deportation under the Act of October 16, 1918, as amended by the Internal Security Act of 1950 (64 Stat. 1006, c. 1024, Title I, Section 22) providing in pertinent part for the deportation of—

"Any alien who was at the time of entering the United States or has been at any time thereafter" a member of the following class:

> Aliens who are members of * * * the Communist Party of the United States (8 USC 137(2), 137-3(a), Supp. V 1946 ed.)

Mangaoang, who had been a national of the United States in 1938 and 1939 when he belonged to the Party, contended that the law called for the deportation only of one who was an alien and a member of the Party simultaneously. The district court ruled that membership and alienage did not have to be coexistent. *Eichenlaub* was relied upon. The circuit court, reversing, ruled that the words "aliens who *are* members" (emphasis in original) indicated that Congress referred to persons who were at the same time both aliens and members of the Party. The court distinguished *Eichenlaub* on the ground that language there calling for the deportation of certain aliens convicted "since August 1, 1914" limited deportation only in that the conviction had to be after the date given; there was no requirement that alienage must have existed at the time of conviction.

The Government had also contended that if the law called for alienage and membership to exist simultaneously, Mangaoang was deportable, nevertheless, because he had to be considered as if he were an alien since the Philippine Independence Act of 1934 provided that for the purpose of all immigration laws, Philippine nationals "shall be considered as if they were aliens." The circuit court held that there was doubt as to whether Filipinos were to be considered as aliens under all immigration laws or only under immigration laws which existed up to the time the provision went into effect but that if the directive applied to legislation which became effective subsequently, there was nothing in the law under which Mangaoang's deportation was sought which authorized the deportation of nationals who were to be considered aliens. Moreover, if a construction was possible which required deportation of nationals who

were to be considered aliens, it would raise an ambiguity which must be resolved in favor of the alien. In deciding this issue, the court also placed reliance upon the fact that the directive had become obsolete in 1946 and no longer had any effective reference to any one. Finally, as a further reason why Mangaoang was not deportable, the court pointed out that deportation was authorized only of an alien who had made an entry into the United States and that when Mangaoang came to the United States in 1926, he had not made an entry.

Resurreccion- Talavera v. *Barber*, 231 F. 2d 524, C.A. 9 (1956), involved a person born in the Philippines. He was a national of the United States from birth to 1946 when he became an alien. He entered the United States in 1934. In 1942, he was convicted of crime. In 1952, he made several visits to Mexico. He was ordered deported under Section 19 of the Immigration Act of 1917 for having been convicted of crime prior to his entry. The pertinent law provided that "any alien who was convicted * * * prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; shall * * * be * * * deported." Talavera argued that this law did not apply to him because he had been a national at the time of conviction. The court sustained the order of deportation. The court stated "that Talavera was a national of the United States and not an alien at the time of his conviction of the crime involving moral turpitude is irrelevant. * * * The statute under which Talavera was ordered deported does not include a requirement that the deportee be an alien at the time of his conviction." (p. 525)

Counsel is of the belief that the result in *Mangaoang* was different from that in *Eichenlaub* or *Talavera* because *Mangaoang* used the present tense in calling for deportation while in the other cases (counsel alleges), deportation was called for in the past tense. It follows, therefore, counsel contends that since in the instant case deportation is called for in the present tense, the result should be that

found in *Mangaoang*, i.e., a coexistence of alienage and the coming into being of the ground of deportation.

We do not believe that counsel's contention can be sustained. In the first place, the language in *Eichenlaub* is not confined to the past tense; it calls for the deportation of aliens who "have been or may hereafter be convicted." Moreover, there is nothing in *Talavera* or *Eichenlaub* to indicate that the tense affected the courts' decision. The Courts found alienage was not a necessity simply because the language did not call for alienage at the time of conviction—either an alien or a citizen could come within the language used. In *Mangaoang*, on the other hand, only an alien could comply with the language the court found controlling. That tense alone is not sufficient where the language does not eliminate all but aliens may be seen from the fact that Congress used the *past* tense in requiring the deportation of individuals for acts which could have been committed *only at a time when they were aliens*, for example, entry without inspection (Section 241(a)(2), 8 USC 1251) or failure to register as an alien (the first ground set forth in Section 241(a)(5) of the Act, 8 USC 1251). Surely something stronger than tense of a verb would have been used by Congress had there been the intent to exempt the convicted person who had been a naturalized citizen when the ground of deportability arose, but later became an alien.

That Congress would have resorted to definite language requiring coexistence of alienage and the creation of a ground of deportation is strengthened by an examination of the history of the law. In 1950, the Supreme Court, considering *Eichenlaub*, found that Congress, in enacting legislation to deport aliens, could not have been unaware of the fact that in the United States there were and would be aliens who became aliens because of the cancellation of their naturalization. The Supreme Court concluded that if Congress had desired to exempt a denaturalized citizen from the application of the immigration laws because he had been a citizen when the ground of deportation arose, provision

to this effect would have been made. This consideration is pertinent today. The Immigration and Nationality Act of 1952 was enacted with considerable thought having been given to the cancellation of naturalization (Commentary on the Immigration and Nationality Act, pp. 86-87, Title 8, Aliens and Nationality (1953); S. Rep. No. 1515, 81st Cong., 2d Sess., 754-769 (1950)). The Act was the result of the study of "each of the thousands of provisions of our immigration and naturalization laws with the end in view of appraising their adequacy, force and effect and in conjunction therewith the judicial and administrative interpretations of the provisions of the law and the rules and regulations implementing them." (S. Rep. No. 1137, 82d Cong., 2d Sess. 2 (1952),). The Senate version of what became the Immigration and Nationality Act contains a proposal based on the law involved in *Eichenlaub* (S. Rep. No. 1137, 82d Cong., 2d Sess. 21-22) and the very law was incorporated in Section 241(a)(17) of the Act (8 USC 1251). We cannot find that Congress was not aware of the existence of *Eichenlaub* or the problem of the denaturalized person when it enacted Section 241(a)(4) of the Act. Furthermore, in connection with its study of the immigration laws, Congress had before it (S. Rep. No. 1137, 82d Cong., 2d Sess. 2) the following recommendation of the Special Committee to Investigate Organized Crime in Interstate Commerce:

> The immigration laws should be amended to facilitate deportation of criminal and other undesirable aliens. To this end, the committee recommends the adoption of the legislative proposal heretofore recommended by the Commissioner of Immigration and contained in section 241 of S. 716 (82nd Cong.), now pending before the Senate Judiciary Committee.[3]

[3] See testimony of the Commissioner before the Committee on March 26, 1951 (S. Rep. No. 307, 82d Cong., 1st Sess. 579) discussing grounds of deportation similar to that found in Section 241(a) of the Act and the additional proposal for the deportation of aliens who at any time after entry were convicted of crime and declared to be undesirable by the Attorney General.

> Some of the criminals who occupy key positions in criminal gangs and syndicates are alien-born. Some came into this country illegally. Some have never been naturalized. Others obtained naturalization certificates by concealing their criminal activities. (S. Rep. No. 307, 82d Cong., 1st Sess. 15)

It appears to us that this is some indication that Congress desired that a naturalized person whose naturalization was revoked should be made the subject of deportation proceedings, and that the deportation of alien criminal elements be facilitated whether or not they had been naturalized.

Counsel, relying upon the characterization of *Eichenlaub* in *Brancato*, contends that *Eichenlaub* is not applicable. In *Brancato* the court said that *Eichenlaub* did not apply to the "general deportation statute." This statement is dicta for the case had already been decided on the theory that an entry was required and Brancato had made no entry since he had entered as a United States citizen. With due reference to the dicta of the circuit court, we would point out that the majority opinion in *Eichenlaub* made no attempt to distinguish the Act of 1920 involved from the general deportation statute and that Mr. Justice Frankfurter (joined in his dissenting opinion by two other Justices) was of the belief that "The court's decision has serious implications with respect to citizens denaturalized for reasons not involving moral blame, and who have, while citizens, committed one of a variety of acts not involving moral obliquity and certainly not endangering the security of the country but which nevertheless are covered by other statutory provisions in language similar to that before us." He gave as an example a provision of the general deportation statute which provided for the deportation of an alien convicted for violation of a narcotic law. Moreover, *Eichenlaub* has generally in both administrative and judicial opinions been considered as applying to the general deportation law (*e.g.*, *Marks* v. *Esperdy*,

198 F. Supp. 40, S.D. N.Y. (July 5, 1961) and *Matter of P-*, 4 I&N Dec. 373).

Furthermore, it is most telling that Congress which presumably knew of *Eichenlaub* placed the ground of deportation involved there in the general deportation statute in 1952 when it was made a part of Section 241(a)(17) of the Act (8 USC 1251) and provision also was made for the deportation of aliens who violate current provisions of the 1920 Act found in 18 USC 791-794, 2388, and 3241. For what it may be worth, we must point out that *Mangaoang*, upon which counsel places such reliance, also did not concern the general deportation law (Immigration Act of February 5, 1917); it involved a special law relating to the exclusion and expulsion of subversives (Act of October 16, 1918, 40 Stat. 1012 as finally amended by the Act of September 22, 1950 (64 Stat. 987)). Lastly, it must be stated that *Talavera* involved the *general immigration statute.*

Counsel contends that it is improper to apply Section 241(a)(4) of the Act to one who was convicted while he was a citizen because such application makes ineffective the provisions of Section 241(b) of the Act which permit a court to make a recommendation against deportation within 30 days of passing sentence. Counsel relies upon *Gubbels* v. *Hoy*, 261 F.2d 952, C.A. 9 (1958). *Gubbels* involved the question as to whether a conviction of a military court could be a basis for deportability. The court held that since a military court could not make a recommendation against deportation, Congress had not intended to make its sentence the basis for deportation. The issue was the nature of the tribunal whose judgment Congress intended to be the basis for deportation. This is not the issue here, where as the special inquiry officer has pointed out, it was not the nature of the tribunal but the respondent's misconduct in obtaining naturalization improperly which prevented him from obtaining a recommendation against deportation. (Actually, the question of making a

recommendation could have been raised by the respondent who had been fighting efforts of the Government to denaturalize him since at least October 1952 (Ex. 5, p. 2).)

Moreover, the fact that an alien has not had an opportunity to petition the court for a recommendation against deportation does not prevent his deportation for conviction of crime under a law which does provide for such recommendation. The right of the nation to expel aliens is absolute and unqualified (*U. S. ex rel. Circella* v. *Neely*, 115 F. Supp. 615, 626, N.D. Ill. (1953) aff'd sub nom *U. S. ex rel. Circella* v. *Sahli*, 216 F.2d 33, C.A. 7 (1954), certiorari denied 348 U.S. 964; and *Matter of L-*, 8 I&N Dec. 389, 390). See, *U. S. ex rel. Kalonis* v. *Davis*, 13 F.2d 630, C.A. 2 (1926); *Todaro* v. *Munster*, 62 F.2d 963, C.A. 10 (February 10, 1933); and *Matter of Y-M-*, 8 I&N Dec. 94. Moreover, the provisions calling for the deportation of convicted aliens and the making of recommendations against deportation have been in effect since 1917. Filipinos convicted between 1917 and at least 1934 were nationals of the United States to whom the immigration laws did not apply. Yet, in 1934 Congress had no hesitancy in providing for the application of the immigration laws, including the 1917 Act, to Filipinos for acts which had occurred (and until 1946 would occur) while they were nationals. (See, *Misina* v. *Rosenberg*, 278 F.2d 291, 296-297, C.A. 9 (1960).) Finally, there is still available to the respondent the benefits of that portion of Section 241(b) which prevents deportation of one who has obtained a pardon.

Several administrative decisions are pertinent to the issue as to the necessity of the coexistence of alienage and the conviction. *Matter of L-*, 6 I&N Dec. 666 (1955) concerned an individual who had entered the United States as an alien in 1926. He became a United States citizen in 1931. He was convicted of four crimes in 1940. In 1950, he lost United States citizenship under Section 401(g) of the Nationality Act of 1940 which provided for the expatria-

tion of a dishonorably discharged citizen who in time of war had been convicted by court martial of desertion. Deportation proceedings were brought under Section 241(a)(4) of the Act charging L- with having committed two crimes after entry. The Board sustained the order of deportation. Subsequently, the Supreme Court ruled that Section 401(g) of the Nationality Act of 1940 was unconstitutional (*Trop* v. *Dulles*, 356 U.S. 86) and because of this, on September 11, 1958 the Board withdrew its order of 1955 and terminated proceedings. Counsel in a supplemental brief presents the belief that the Board's order in 1955 was in error. He is of the belief the issue was given little consideration; that expatriation presents a different situation from a cancellation of naturalization; and that Mangaoang was distinguished administratively merely on the grounds relating to entry, ignoring the additional ground concerning the coexistence of alienage and the ground of deportability. We do not believe our decision was in error. The issue was appropriately considered and decided on the basis of precedents including *Eichenlaub*.

Matter of S-, 5 I&N Dec. 678 (1954) concerned a person who while a citizen of the United States had been convicted of theft on three occasions. Subsequently, he lost his United States citizenship by taking an oath of allegiance to a foreign government. When he attempted to return to the United States, he was excluded under the Immigration and Nationality Act as one who had been convicted of crime involving moral turpitude prior to entry. The alien contended that at the time the offenses were committed he was not an alien but a citizen and was not excludable because he had never been convicted of crime as an alien. The Board held that the contention was without merit because the Act required the exclusion of persons who were aliens without excepting those who had been citizens and suffered expatriation. *Eichenlaub* was relied upon and *Mangaoang* was distinguished by reference to its third numbered paragraph. This paragraph points out

that *Mangaoang* differs from *Eichenlaub* because in *Eichenlaub* the language "did not require a showing that at the time of conviction * * * the person in question had then been an alien" while in *Mangaoang* the language did require the person to be an alien. Counsel contends that S- was found excludable "because of the past-tense language of the statute involved" and that *Mangaoang* "was distinguished as being based on a present-tense statute similar to Section 241(a)(4)." We find no mention of tense as a reason for ordering S-'s deportation. The convictions in S- could have happened to either an alien or a nonalien, and the law did not limit deportability to those who had been convicted only as aliens. This was the basis of the decision. The same basis for decision was used in *Matter of M-*, A-11875663, Int. Dec. 1169 (July 16, 1961) which involved a native-born citizen of the United States who had been convicted of crime in 1951. He expatriated himself in 1959 by service in the armed forces of a foreign state. He last entered in 1960. His deportation was ordered under the Act as one who had been excludable in 1960 as an alien convicted of crime prior to entry.

Matter of P-, 4 I&N Dec. 373 (1951) and *Matter of W-*, 5 I&N Dec. 759, 764 (1954) involved persons who entered as United States citizens and were ordered deported for having been convicted of crime, or having admitted commission of crime prior to last entry. Counsel is of the belief that deportation was ordered because the past tense was used in the laws. In these cases, decided before *Brancato*, the Board's decision was not based upon the tense of the statute involved but upon the fact that denaturalization stripped the individual of United States citizenship retroactively. There is no basis for concluding that the Board would have acted differently had the statutory language been written *in praesenti*.

Counsel contends that to find it possible to interpret Section 241(a)(4) to make the coexistence of alienage and conviction unnecessary would make the statute ambiguous so

that a construction favorable to the respondent should be taken. The rule of the cases, however, is clear. When the law requires deportation for acts which can be performed or happen to either an alien or a citizen, nationality status at the time of the performance or happening is immaterial unless the law provides that alienage must be present. There is thus no ambiguity. Applying the rule to the language of Section 241(a)(4), we find that the act condemned-conviction can occur to either a citizen or an alien and that the law does not provide that the subject be an alien. Therefore, alienage at the time of conviction was not a necessity[4] and the charge is sustained if moral turpitude is involved and the crimes did not arise out of a single scheme of criminal misconduct.

Single Scheme

Counsel contends that the Service has failed to prove that the two convictions on which the order of deportation is based did not arise "out of a single scheme of criminal misconduct." The respondent had been indicted for filing false and fraudulent income tax returns for 1946, 1947, 1948 and 1949. The jury convicted the respondent for the years 1947, 1948 and 1949. He was sentenced to five years on each count to run concurrently and a fine was imposed. On appeal, the conviction as to 1947 was reversed.

At the deportation hearing, the respondent refused to testify. The Service presented the record of the convictions, showing in one count a violation of the law by the filing of a fraudulent return on January 14, 1949 for the calendar year 1948, and in the other count, a fraudulent filing of a tax return on March 10, 1950 for the year 1949.

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[4] So that all major aspects of the case may be properly developed for judicial review, if it should take place, we shall subsequently discuss the issue as to whether the respondent must not be considered to have been an alien at the time of conviction.

The Service then rested. In his defense, the respondent presented the summation of the prosecuting attorney at the tax evasion trial as evidence that the convictions arose out of a single scheme (Ex. 15). The summation reveals that the Government's case is built upon the net worth theory. Proof was made of the respondent's assets in 1946, the amount of income he reported for the years 1946 to 1949, the fact that he had spent twice the money he had reported as income for those years, and the fact that there was a source from which the additional income could have come to the respondent. The sums spent over and above that which could be attributed to the assets started with and income reported were alleged to be income concealed. The belief of the respondent sets forth several instances where the prosecuting attorney, in his summation, made the point that the respondent had so conducted himself over a period of years that he had spent twice as much as he had reported, defrauding the Government of taxes due. Great emphasis is put on this statement of the prosecuting attorney. "If the Frank Costellos can get away with this scheme to defeat and defraud the Government out of income taxes, then the honest taxpayers of this country * * * will carry the load * * *." (p. 1834, Ex. 4) The respondent also submitted a subpoena for Fennelly, an attorney, who had represented the respondent at the trial on income tax evasion. It was alleged that although not a participant, the witness allegedly had knowledge of the facts which would show a single scheme. Counsel explained that the request to subpoena Fennelly came after the death of Delaney, another of the respondent's attorneys at the tax evasion trial and one who had agreed to testify. The request was denied. Counsel then requested (and received) permission to submit affidavits from Fennelly and another person. However, affidavits were not submitted. The Government presented the summation of the defense counsel at the tax evasion trial (Ex. 17), an affidavit of Costello's in support of a motion for inspection of minutes of the grand jury (Ex. 18) and

testimony of Sweeney, a defense witness at the tax evasion trial (Ex. 19).

The special inquiry officer ruled that the burden of proving that the convictions had not arisen from a single scheme was upon the Government and that in the absence of probative evidence to the contrary, a record of conviction failing to show acts in furtherance of a common plan would suffice to establish a single scheme did not exist. The special inquiry officer, relying heavily on *Chanan Din Khan* v. *Barber*, 147 F. Supp. 771, N.D. Calif. aff'd 253 F.2d 547, C.A. 9 (1958), certiorari denied 357 U.S. 920, where the facts are similar to those in the instant case, found that a single scheme had not existed.

Counsel contends the Service cannot bear its burden of establishing that the respondent's crimes did not arise out of a single scheme by merely introducing a conviction in the situation before us because there is nothing in the two successive tax evasions which negate singleness of scheme. Counsel contends the Service is under the obligation of making further proof that a single scheme was not involved. Counsel contends that *Chanan Din Khan* is wrong because it was decided in the belief that the burden of proof as to the single scheme issue was on the alien rather than on the Service, and because the term "single scheme" was equated with a single punishable crime. Counsel contends that these tests were rejected in *Wood* v. *Hoy*, 266 F.2d 825, C.A. 9 (1959).

Chanan Din Khan was reviewed in *Wood* and quoted from without criticism. It is, therefore, guiding authority for a situation such as was involved there. *Chanan Din Khan*, on facts very similar to those before us, held that an indictment showing convictions on two fraudulent returns filed a year apart is persuasive evidence that two unrelated crimes were involved. In the instant case, there is no probative evidence controverting the inference which flows from the commission of crimes a year apart. Certainly, the remarks of the prosecuting attorney at the tax evasion trial do not controvert the inference which flows

from the convictions. The prosecuting attorney was concerned with the concealment of income from the Government to avoid payment of taxes. He did not have to prove that when the respondent took the first step to defraud the Government, that he intended to continue to do so for the next three years. The word "scheme" could have been applied to actions and plans which had as their end the filing of a fraudulent tax return if only one year had been involved. It was unnecessary for the prosecuting attorney to establish that there was a *scheme* to commit both violations in order to obtain a conviction. Moreover, even if this ambiguous opinion by the prosecuting attorney, made in the heat of advocacy, referred to a conspiracy for the four years, it would not be controlling as to the actual state of mind of the respondent. In fact, if the opinion of the prosecuting attorney were meant to express the belief that when the respondent filed his return for 1946 he conspired to defraud the Government in the next three years, it was an opinion not shared by the jury which acquitted the respondent on the charge involving the year 1946.

Counsel cites *Matter of F-G- and C-D-*, 8 I&N Dec. 447, in support of his contention that the convictions in the instant case arose out of a single scheme. In the administrative decision cited, the first alien had been convicted on two counts of making a false statement for the purpose of obtaining unemployment insurance benefits. In count one he was charged with making the first false statement and in count two with making the second false statement a week later. The Board decided that it was proper to conclude that when the alien falsely represented he was unemployed to obtain benefits, he intended to do it again on the following week, although the inference might be too broad if attempt were made to extend it to the entire 26 weeks of benefits. In the instant case, it would be even less proper to infer that the intention to falsify the return filed in March 1950 was formed in January 1949 when the prior fraudulent return was filed (*Chanan Din Khan* v. *Barber*, supra).

Counsel contends that the net worth theory by its very nature prevents a showing that two crimes did not arise out of a single scheme. This contention is based on the belief that under the net worth theory, convictions for two successive years are possible upon proof of facts which show no more than that the indicted person received a sum of money in one year and spent it in two successive years without reporting what was spent as income in either year. In other words, the possibility is raised that in January 1949, the respondent evaded the payment of taxes then due on income which he had received in 1948 and that although in March 1950, he filed a return showing some income in 1949, it could have been from the same income concealed in 1948 that the money came which was spent in 1949 in excess of that reported. It is answer enough that there is no proof that the convictions for 1948 and 1949 were the result of a conspiracy to evade payment of taxes for income which had been received only in 1948. On the contrary, the record of that trial reveals there was income for both 1948 and 1949 (Ex. 19, pp. 1679(a)-1681(a)). Moreover, an examination of the reported tax conviction case reveals the following pertinent charge to the jury.

> This [net worth] method involves determination of the defendant's net worth at the beginning and end of a period in order to foreclose the possibility that the expenditures were made, or the net worth increases were derived, from prior accumulated funds.
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> In order for you to find that sums received by the defendant during any of the taxable years constituted income to him, it is not necessary for the Government to have proved the exact source of the income. None of the alleged excess investments and expenditures made by the Costellos during any year shall be considered in determining the taxable income of the defendant Frank Costello in any year unless you find that there was an excess of expenditures and invest-

ments, and that it constituted money which the defendant received as taxable income during the year in which the money was spent. (*United States* v. *Costello*, 221 F.2d 668, 676, C.A. 2, aff'd 350 U.S. 354)

The net worth theory is a method for proving that a crime was committed during a particular year. Its use does not negate the possibility that the crimes were the results of independent volitions made from year to year rather than at one time in a particular year.

MORAL TURPITUDE

We come now to the question of whether the special inquiry officer properly found that the respondent's convictions on two counts for violation of 26 USC 145(b) involve moral turpitude. The special inquiry officer, relying upon judicial precedents, found that fraud was an ingredient, and that moral turpitude was present. The issue was fully discussed by the special inquiry officer. Counsel contends that *United States* v. *Scharton*, 285 U.S. 519 (1932) and *United States* v. *Carrollo*, 30 F. Supp 3, W.D. Mo., 1939, require a contrary finding. Similar contention based upon the cases cited by counsel was made in *Chanan Din Khan* v. *Barber*, 147 F. Supp. 771, 775, N.D. Calif. (1957), which concerned violations of the same section involved in the instant case. The court found that moral turpitude was present. The decision of the court was affirmed upon appeal 253 F.2d 547 and certiorari was denied 357 U.S. 920. We see no need to discuss this issue further.

We find no reversible error in the denial for the issuance of a subpoena for Fennelly. The issuance of a subpoena is a discretionary matter. While the respondent was entitled to produce evidence in such form as he desired, there was no abuse of discretion in denying the subpoena in the absence of some more specific statement as to the testimony which the witness could offer.

The respondent's deportability is established on the first charge because of convictions for evasion of taxes.

RELATION BACK THEORY

Our conclusion is that alienage and conviction need not be coexistent; however, as we previously indicated, we shall consider the issue as to whether the respondent should be regarded as having been an alien at the time of the conviction since he has been denaturalized under Section 340(a) of the Act (8 USC 1451). The second provides that revocation "shall be effective as of the original date of the order and certificate." The special inquiry officer found the law to be that denaturalization is retroactive and confers upon the subject the status of an alien at all times and for all purposes, except that one who entered while naturalized may not be considered as having entered as an alien, and except that certain language providing for the deportation of an alien who is a member of a proscribed organization, requires that there must be a coexistence of alienage and membership. The special inquiry officer ruled that since Costello fell in neither of the exceptions, he must be considered as having been an alien at the time of the conviction. Counsel contends that the "relation-back" theory should not be applied because judicial precedents require that a denaturalized person be regarded as if he had been a citizen before the denaturalization even though he was not lawfully entitled to be naturalized. We believe that the "relation-back" theory is properly applied here.

Prior to the Immigration and Nationality Act, it was established that a revocation of naturalization, whether for fraud or for illegality, was retroactive (*U.S. ex rel. Brancato* v. *Lehmann*, supra). While there was general agreement that the denaturalized person must be considered as an alien from the time of the denaturalization, the rule of the cases appears to have been that the fiction that alienage existed at any particular moment in the past would not be indulged in if the individual would be required to do what was impossible of performance. Thus, the fiction was not indulged in where it would require an individual who entered as a United States citizen to have

been in possession of the documents required of an alien (*Matter of C-*, 3 I&N Dec. 275, A.G., 1950). In the same vein, it was improper to consider one who did something as a national of the United States, as if he had done it while an alien (*Barber* v. *Gonzales*, supra). However, the relation-back doctrine was applied where it did not require the "impossible" of the alien (*Matter of P-*, 4 I&N Dec. 373).

Although it is the contention of counsel that it is improper to apply Section 340 (a) to a deportation section, we see nothing in the wording or the history of this law (which at the minimum merely restates what was decided judicially) that would prevent its application to deportation proceedings. The section can be given effect in the case before us without violence to precedents if we consider the respondent as an alien at the time he was convicted. The commission of crime or the conviction was not related to nationality. To consider the respondent as having been an alien at the time of the conviction imputes to him no action which he, as a citizen, could not have done. No impossibility is asked for. We believe it is proper for the purposes of Section 241(a)(4) of the Act to consider the respondent as having been an alien at the time of his conviction. (*Cf. Mesina* v. *Rosenberg*, 278 F.2d 291, C.A. 9 (1960))

Counsel contends that Congress could not have intended the relation-back theory to apply because in Section 241(b) provision was made for a recommendation against deportation, a provision which would be of use only to an alien. This contention has been previously considered; we pointed out that Congress has the power to deport an alien who had no access to a recommendation against deportation. Congress must have realized that the 30-day period within which such a recommendation could be made would have passed by the time of the denaturalization, and may have been content to permit the denaturalized person to resort to a pardon.

At oral argument, counsel expressed the belief that the special inquiry officer had used *Eichenlaub* as authority to give a retroactive effect to alienage (p. 4 of oral argument). Although the special inquiry officer gave a retroactive effect to the denaturalization, he did not use *Eichenlaub* as authority for this. (See last sentence on p. 15 of the special inquiry officer's opinion.) The special inquiry officer relied upon the statutory declaration in Section 340(a) of the Immigration and Nationality Act (p. 18 of special inquiry officer's opinion).

The special inquiry officer found the respondent deportable on the first charge. The first charge is superfluous; it is contained within the third. The record does not establish the respondent's deportability on the second charge for the reasons stated by the special inquiry officer. The respondent's deportability on the third charge is sustained, based on the tax evasion convictions; deportability on the basis of the other convictions has not been established.

The findings of fact and conclusions of law of the special inquiry officer are adopted except Conclusion of Law No. 3 will be amended to eliminate the convictions in 1954 for tax evasion as grounds on which the respondent is not deportable:

> (3) That you are not deportable under Section 241(a)(4) of the Immigration and Nationality Act based on conviction for two crimes after entry (contempt of Congress in 1952; contempt of court in 1957).

ORDER: It is ordered that the appeal be dismissed.

IT IS FURTHER ORDERED that the respondent be deported from the United States in the manner provided by law on the third charge of deportability based solely on the income tax convictions.

* * * * * * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 81—October Term, 1962

(Argued November 9, 1962 Decided December 4, 1962)

Docket No. 27597

FRANK COSTELLO, *Petitioner*,

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*.

Before:

MEDINA, SMITH and KAUFMAN, *Circuit Judges*.

Petition, pursuant to 8 U.S.C. Section 1105(a)(1), to review an order of deportation sustained by the Board of Immigration Appeals. Petition dismissed.

EDWARD BENNETT WILLIAMS, Washington, D. C. (Harold Ungar, Washington, D. C., on the brief), *for petitioner*.

ROY BABITT, Special Assistant United States Attorney, New York, N. Y. (Vincent L. Broderick, United States Attorney for the Southern District of New York, New York, N.Y., on the brief), *for respondent*.

MEDINA, *Circuit Judge:*

Frank Costello, an alien, entered the United States from Italy in 1895; he became a naturalized citizen in 1925; he was convicted in 1954 of income tax evasion for the years 1948 and 1949, under two counts of a single indictment that

contained no conspiracy charge, *United States* v. *Costello*, 2 Cir., 1955, 221 F. 2d 668, affirmed, 1956, 350 U. S. 359; and in 1959 his naturalization was revoked. *United States* v. *Costello*, 2 Cir., 1960, 275 F. 2d 355, affirmed, 1961, 365 U. S. 265. Deportation proceedings based upon the two convictions resulted in the order of deportation now sought to be reviewed under 8 U. S. C. Section 1105(a)(1), after an unsuccessful appeal to the Board of Immigration Appeals.

The controlling statute is Section 241(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Section 1251 (a), the pertinent provisions of which follow:

> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> (4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial; * * *.

Costello's contentions are: (1) that the statute was not intended to apply to a person of naturalized status at the time of the convictions; (2) that the Government failed to establish conviction of two crimes "not arising out of a single scheme of criminal misconduct"; (3) that convictions of tax evasion did not constitute convictions of crimes involving moral turpitude; and (4) that it was prejudicial error not to issue a subpoena to the lawyer who represented Costello at the criminal trial for tax evasion, and who allegedly would have testified to the effect that the two convictions did arise "out of a single scheme of criminal misconduct."

We find no merit in any of these contentions and dismiss the petition.

I

After several years of intensive study the Congress passed the Immigration and Nationality Act of 1952, and it became law. One of the specific objectives of this legislation, largely in response to recommendations by the Senate Special Committee to Investigate Organized Crime in Interstate Commerce,[1] was to broaden the provisions governing deportation, "particularly those referring to criminal and subversive aliens."[2]

As the construction of the statute relied upon by Costello would frustrate the general legislative purpose just referred to, and in effect grant immunity, during the period between the granting and the revocation of naturalization, to those who fraudulently obtained the status of citizens, it would seem to require at least a fairly persuasive argument to induce us to interpret the statute in such fashion as to require, as a prerequisite to deportation in the case of a denaturalized person, two convictions of crime either prior to his naturalization, or subsequent to the revocation thereof for fraud. In other words, despite the fact that the person sought to be deported has not only been twice convicted of crime, but also has obtained citizenship status by fraud, we are told that by some mischance the statute has been so worded as to leave a loophole through which Costello may avoid deportation.

When the various integral parts of the statute are read together, as they must be, it is not surprising to find that no such loophole exists. There is no ambiguity, and no occasion to apply the rule of *Fong Haw Tan* v. *Phelan*,

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[1] House Report No. 1365, 82nd Cong., 2nd Sess. (1952), p. 28.

[2] *Commentary on the Immigration and Nationality Act*, Walter M. Besterman, Legislative Assistant to the House Committee on the Judiciary, 8 U. S. C., Part I, p. 61.

1948, 333 U. S. 6, to the general effect that doubts are to be resolved in favor of the deportee.[3]

Walter M. Besterman, Legislative Assistant to the House Committee on the Judiciary, in his Commentary on the 1952 Act, *supra*, 8 U. S. C. at page 18, states: "Section 1101 dealing with definitions is to be regarded as probably the most important, truly pivotal segment of the statute." See also House Report No. 1365, *supra*, page 31. 8 U. S. C. Section 1101(a)(3), Section 101(a)(3) of the Act, defines an "alien" as "any person not a citizen or national of the United States." Accordingly, as the statute speaks in terms of the time of enforcement, when Section 241(a)(4), 8 U. S. C. Section 1251(a)(4), directs that any "alien * * * shall * * * be deported who * * * at any time after entry is convicted of two crimes involving moral turpitude," there is no room for interpretation or construction. At the time the proceedings for deportation were commenced Costello was a person not a citizen or national of the United States and the date of his two convictions is at a time after his entry into the United States. In the context of the statute the word "is" appears to us to be the most comprehensive word that could have been used, just as is the case with the phrase "at any time after entry."[4] See Sutherland, Statutory Construction, 3rd Ed., 1943, Section 4930.

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[3] The doubt thus resolved in *Fong Haw Tan* concerned the meaning of the words "sentenced more than once," various Courts of Appeals in several Circuits having given this phrase different and conflicting constructions.

[4] Costello's contention that the use of the word "is" requires that alienage and the deportable crimes be simultaneous rests too much upon this single word of the statute and gives the language of the statute a meaning contrary to its natural tenor. Indeed, the Supreme Court has paraphrased this section as providing for "the deportation of an alien who 'at any time after entry' has been convicted of two crimes involving moral turpitude." *Lehmann v. United States, ex rel. Carson*, 1957, 353 U. S. 685, 689, rehearing denied, 354 U. S. 944.

Far from supporting Costello's argument on this point, *Eichenlaub* v. *Shaughnessy*, 1950, 338 U. S. 521, strongly supports the Government view of the meaning of Section 241(a), 8 U. S. C. Section 1251(a). There "all aliens who since August 1, 1914, have been or may hereafter be convicted" of violations of the Espionage Act of 1917, as amended, were made deportable, provided the Attorney General after a hearing found them to be undesirable residents of the United States. Thus the time of conviction is stated to be, as paraphrased by the Supreme Court, at page 530, "since about the beginning of World War I (August 1, 1914), whether those convictions were had before or after May 10, 1920," when the statute under consideration became effective. In Section 241(a), 8 U. S. C. Section 1251(a), before us now, the time of the convictions is stated to be "at any time after entry." What the Supreme Court decided was precisely the point now raised by Costello, and it was decided against the deportee. *Eichenlaub* had fraudulently procured his naturalization, and the revocation or cancellation of his certificate of citizenship took place after his conviction. So he argued that he was not an alien when convicted and that the statute was not applicable, as it did not in terms include an alien who was not an alien at the time of his conviction. This was supposed to be at least an ambiguity to be resolved in favor of the deportee. Despite a strong dissent by Mr. Justice Frankfurter on the basis of this identical argument, the Supreme Court found no ambiguity, and held, at page 530:

> A simpler and equally complete solution lies in the view that the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders, including those denaturalized before or after their convictions as well as those who never have been naturalized.

So here, the language of the statute is all inclusive, there are no exceptions. And, to paraphrase the comment in *Eichenlaub*, at pages 530-1, it is difficult to imagine a reason for the Congress to provide for the deportation of an alien, convicted of two crimes involving moral turpitude, who had never been naturalized, but to prohibit the deportation of an alien who had not only been convicted of two crimes involving moral turpitude, but had in addition fraudulently secured a certificate of citizenship. Such a distinction simply does not make sense.

The Congress, in the formulation of the provisions of the 1952 Act, desired to merge all existing statutes, judicial decisions, and administrative interpretations into a single, comprehensive, completely revised immigration and nationality code.[5] There is internal as well as external evidence that those who drafted this code were aware of the decisions of the Supreme Court and of other courts relevant to their task, including *Eichenlaub*.[6]

The cases relating to allegedly analogous situations, relied upon by Costello are all distinguishable. For purposes of reference, we have collected them in a footnote,[7] but think to discuss them in detail would carry us too far afield. Moreover, we express no opinion relative to the validity and persuasiveness of the reasoning upon which these decisions are based.

A subsidiary point made by Costello on this phase of the case is that he could not fairly be considered to

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[5] Sen. Report No. 1515, 81st Cong., 2nd Sess. (1950), pp. 1-4; Joint Hearings on S. 716, H. R. 2379 and H. R. 2816, 82nd Cong., 1st Sess. (1951), pp. 1-4; House Report No. 1365, *supra*, pp. 27-28.

[6] Sen. Report No. 1515, *supra*, pp. 390-2; Joint Hearings on S. 716, H. R. 2379 and H. R. 2816, *supra*, p. 694.

[7] *Mangaoang* v. *Boyd*, 9 Cir., 1953, 205 F. 2d 553, cert. denied, 346 U. S. 876; *Gubbels* v. *Hoy*, 9 Cir., 1958, 261 F. 2d 952; *Resurreccion-Talavera* v. *Barber*, 9 Cir., 1956, 231 F. 2d 524.

be an alien convicted of two crimes involving moral turpitude, within the meaning of Section 241(a), 8 U. S. C. Section 1251(a), as such a construction would, as to him, render meaningless and nugatory the provisions of Section 241(b)(2), 8 U. S. C. Section 1251(b) to the effect that Section 241(a), 8 U. S. C. Section 1251(a), shall not apply "if the court sentencing such alien for such crime shall make * * * a recommendation to the Attorney General that such alien not be deported."

It is a sufficient answer to this contention, we think, to say that any rights arising out of Section 241(b), 8 U. S. C. Section 1251(b), were waived by Costello as he had secured his naturalization by fraud. Moreover, Costello is chargeable with knowledge that he had procured his naturalization by fraud, and that deportation proceedings might well follow his conviction on any two of the counts in the indictment for tax evasion. There was thus nothing to prevent his asking the sentencing court for a recommendation to the Attorney General that he be not deported. In any event, there is no inherent right to the limited privilege afforded by Section 241(b), 8 U. S. C. Section 1251(b). Basically, of course, we come back to the comment in the opinion of the Supreme Court in *Eichenlaub* above referred to. It is nothing short of absurd to suppose that the Congress intended to favor the alien who, over and above his convictions for crimes involving moral turpitude, had been sufficiently clever and unscrupulous to have defrauded the Government into providing him with the protection of a certificate of citizenship.

II

Did the two crimes of income tax evasion arise "out of a single scheme of criminal misconduct"? Costello says they do; we think they do not.

The only evidence relevant to this issue is the record of the convictions, offered by the Government. Costello did

not testify. The application for a subpoena to procure the testimony of the lawyer who represented Costello at the criminal trial was properly denied. Any summary by this lawyer of the evidence adduced at the trial or interpretations and speculation by him under the guise of testimony concerning the significance of such evidence or of the maneuvers of counsel would have plainly been completely devoid of probative force. If it was thought that specific portions of the trial transcript or indeed the whole thereof was admissible, the trial transcript or parts thereof, with or without the exhibits received in evidence, should have been offered by Costello at the hearing. No such offer was made; and no ruling admitting or excluding such proof is before us for consideration; so we shall not comment further on this peripheral, so-called procedural point. It has no merit whatever.

Before we address ourselves to the phrase "single scheme of criminal misconduct," it is essential that we have before us a brief description of what the record shows as well as what it does not show. We have already observed that the indictment contains no conspiracy count.

The judgment of conviction under date of May 17, 1954 "adjudged" Costello guilty "of the offense of wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife for the years 1947-1948-1949, by filing false and fraudulent joint income tax returns," in violation of Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C. (1940 ed.) Section 145(b). We reversed as to the year 1947, and affirmed the conviction of attempting to evade income taxes for the years 1948 and 1949, *United States* v. *Costello*, 2 Cir., 1955, 221 F. 2d 668; and the Supreme Court affirmed, 1956, 350 U. S. 359. The prosecution proved its case against Costello by the "net-worth method."

Indubitably the two crimes charged in the counts relative to the years 1948 and 1949 are two separate and distinct crimes. *Myres* v. *United States*, 8 Cir., 1949, 174

F. 2d 329, 334, cert. denied, 338 U.S. 849; *United States* v. *Johnson*, 7 Cir., 1941, 123 F. 2d 111, 119, rev'd. on other grounds, 1943, 319 U. S. 503; *United States* v. *Sullivan*, 2 Cir., 1938, 98 F. 2d 79, 80. The acts constituting the commission of these two crimes are separated by a substantial interval of time. In the absence of additional facts to support an inference that the two crimes are related we think the Special Inquiry Officer was required to find, as he did, that Costello had been convicted of two crimes "not arising out of a single scheme of criminal misconduct." This is enough to dispose of this phase of the case, and it appears to be the reasoning adopted by the First and Ninth Circuits. *Chanan Din Khan* v. *Barber*, 9 Cir., 1958, 253 F. 2d 547, 549, cert. denied, 357 U. S. 920; *Fitzgerald ex rel. Miceli* v. *Landon*, 1 Cir., 1956, 238 F. 2d 864, 867.

Concededly Costello, when he filed his joint income tax return for the year 1948, was under a definite obligation to file an accurate and truthful return disclosing his income and that of his wife for that year. With respect to that year the only scheme of criminal misconduct discernible in this record is the single scheme to evade the payment to the Government of the income taxes justly due and payable for that year by filing a false and inaccurate return. Similarly, when he filed his income tax return for the year 1949, he was under a definite obligation to file an accurate and truthful return disclosing his income and that of his wife for that year. Here again the only scheme of criminal misconduct discernible in this record is the single scheme to evade the payment of the income taxes justly due and payable for the year 1949. There is no connection whatever between the two. A finding that the two convictions were of crimes "arising out of a single scheme of criminal misconduct" would not only have been clearly erroneous, it would have been without a scintilla of evidentiary support. Moreover, the circumstance that the Government proved its case against Costello by the "net-worth method" is wholly immaterial.

Much as we are tempted to discuss the theories advanced in a number of decisions by various courts with respect to the meaning of the phrase "single scheme of criminal misconduct," we think the exercise of a proper judicial restraint makes it undesirable for us to reach out and now decide more than the circumstances of this case require us to decide. We would not wish, however, to be thought to subscribe to the views expressed in the cases collected in footnote [8]. The statute makes no reference whatever to any "common scheme or plan"; nor would it seem reasonable to suppose that the Congress intended to grant immunity from deportation to those who over a period of time pursued a course of criminal misconduct, involving numerous successive, separate crimes, consummated at different times but in the same manner, or with the same associates, or even by the use of the same fraudulent devices, disguises, tools or weapons. Nor, in the case of successive bank robberies at different times and places, for example, would it seem that these could be said to have arisen out of a single rather than two separate schemes of criminal misconduct, simply because the robbers, prior to the first robbery, had in mind and had discussed the robbery of the second bank after the hue and cry over the first robbery had subsided. After all there is no denying the fact that the Congress by the 1952 Act intended to make it easier rather than more difficult to deport aliens who were recurrent criminals. But this is by the way.

III

The contention that crimes of income tax evasion do not involve moral turpitude need not long detain us. Costello's brief leads us into a labyrinth of technical rulings

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[8] *Jeronimo* v. *Murff*, S. D. N. Y., 1957, 157 F. Supp. 808, 813; *Zito* v. *Moutal*, D. C. Ill., 1959, 174 F. Supp. 531, 535; *Barrese* v. *Ryan*, D. C. Conn., 1962, 203 F. Supp. 880, 884. See also *Wood* v. *Hoy*, 9 Cir., 1959, 266 F. 2d 825, 829.

in a great variety of supposedly analogous situations. But the plain fact remains that Costello was charged with the offenses of "wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife" for the years 1948 and 1949, by the filing of "false and fraudulent returns," and he was adjudged guilty as charged. The statute pursuant to the terms of which Costello was twice convicted, is as above stated Section 145(b) of the Internal Revenue Code of 1939. The crimes consist of "wilfully" attempting in any manner to evade or defeat any tax imposed by the Act of which Section 145(b) is a part. There can be no "wilful" evasion without a specific intent to defraud. *United States* v. *Martell*, 3 Cir., 1952, 199 F. 2d 670. Accordingly, we hold the two convictions are of crimes involving moral turpitude. *Jordan* v. *De George*, 1951, 341 U.S. 223. An alien who is permitted to enter this country and to enjoy the blessings of freedom under the Constitution and laws of the United States, and who wilfully evades or attempts to evade the payment of his fair share of the taxes needed to support our Government is surely engaged in conduct involving moral turpitude.

Petition dismissed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,048

STANLEY SAWKOW, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS, UNITED STATES DEPARTMENT OF JUSTICE.

Argued December 3, 1962

Before BIGGS, *Chief Judge,* and STALEY, *Circuit Judge,* and LEAHY, *District Judge.*

Opinion of the Court

(Filed January 29, 1963)

By STALEY, *Circuit Judge.*

Petitioner has been ordered deported by the Board of Immigration Appeals. The order is based on the Board's conclusion that he is an alien who subsequent to his entry into this country was convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. 8 U.S.C.A. § 1251(a)(4).

The original deportation charges were preferred against the alien on August 10, 1960, but due to various adjournments and a reopening of the proceedings, the hearing giving rise to this petition did not take place until

September 27, 1961. In the interim various additional charges were lodged by the respondent, but for the purposes of this petition we are concerned with only four charges in all. We deem it advisable at this point to outline the New Jersey criminal actions which formed the basis for them.

(1) Indictment No. 27-59 (robbery of the person on February 13, 1959).

(2) Accusation 85-60 (robbery of the person on February 13, 1959).

(3) Indictment No. 30-58 (receipt of stolen automobile on July 17, 1958).

(4) Indictment No. 31-58 (theft of automobile on July 18, 1958).

The record reveals that with respect to (1) petitioner was sentenced on April 14, 1960, following his plea of *non vult*.[1] However, on November 2, 1960, the sentencing judge vacated this plea together with the sentence which he had imposed. This was done pursuant to N.J.R.R. 3:7-10(a), which provides:

> "A motion to withdraw a plea of guilty or of *nolo contendere* or of *non vult*, may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the Court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his plea."

On February 20, 1961, the state prosecuting officials filed (2), charging petitioner with the same overt act. On March 30, 1961, he was sentenced on his plea of *non vult* to this accusation, the state court making a specific recommendation that he should not be deported. On the same day the indictment for (1) was dismissed. With respect to (3)

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[1] According to Black's Law Dictionary (Fourth Edition), *non vult* is a variation of the form *nolo contendere*.

and (4), sentences to concurrent indeterminate terms at the New Jersey State Reformatory followed similar *non vult* pleas and were suspended.

The special inquiry officer reasoned that because the state court had jurisdiction both to set aside the judgment of conviction on (1) and to thereafter dismiss the proceedings, this charge could not be used as a basis for deportation. He reached the same conclusion with respect to (2) because he found that the recommendation against deportation was binding.[2] The officer further held that the respondent had failed to introduce substantial evidence to meet its burden of proof that the crimes charged in (3) and (4) did not arise out of a single scheme of criminal misconduct. On appeal the Board found that the purpose of the state court in vacating the plea and conviction on (1) was to repair the omission to make the statutory recommendation against deportation, and concluded that because of this the recommendation made in (2) was ineffective. It further concluded that (3) and (4) did not arise out of a single scheme of criminal misconduct. Accordingly, the decision of the special inquiry officer was reversed and the alien was ordered deported to Poland.

In this court petitioner for the first time argues that a sentence entered on a plea of *non vult* is not a conviction for

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[2] "1251. Deportable aliens—general classes

* * *

"Nonapplicability of subsection (a)(4)

"(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply * * * (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. * * *" 8 U.S.C.A. § 1251(b).

deportation purposes. Similarly, he contends that he was never convicted within the meaning of the statute because he was sentenced to confinement at the New Jersey State Reformatory. His failure to present these contentions before the Board would ordinarily preclude him from raising them at this juncture. 8 U.S.C.A. §1105(a)(4); Yee Si v. Boyd, 243 F.2d 203, 207 (C.A. 9, 1957); cf. United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952). However, because we hold that he is not deportable on other grounds, we will assume, *arguendo*, that he was convicted for the purposes of the immigration law.

Petitioner's more fundamental contentions are that the conviction under (2) cannot be use as a foundation for deportation, and that respondent failed to sustain its burden to establish that (3) and (4) did not arise out of a single scheme of criminal misconduct. We agree.

Respondent concedes that a recommendation against deportation made in conformity with the statute at the time of first imposing sentence precludes the use of the conviction in a deportation proceeding. It urges, however, that if a judgment of conviction is vacated for the purpose of avoiding deportation, a subsequent recommendation is ineffectual. This argument misses the mark, for no contention is made that the state court either exceeded its jurisdiction or abused its discretion in vacating the plea of *non vult* together with the judgment of conviction, and subsequently dismissing the indictment. Thus, the action of the state court is concededly valid. That being so, the original judgment is as much a nullity as if the grand jury had never returned an indictment. Obviously, Congress by the use of the phrase "at the time of first imposing judgment or passing sentence" was referring to a valid sentence. Here, the first valid sentence for the robbery committed on February 13, 1959, was imposed on March 30, 1961. At that time a recommendation against deportation was made after prior notice had been given to the respondent which opposed it.

Hence, that conviction cannot be used as a basis for deportation.

Further support for our conclusion is found in Giammario v. Hurney, — F.2d —, (C.A.3, 1962) (slip opinion, p. 4). We there held that a judgment of conviction precludes us from considering anew the issue of an alien's guilt. The same considerations of policy and the orderly administration of justice which underlie that holding apply here with equal cogency to an attack upon an admittedly valid order vacating a judgment of conviction.

Respondent places great reliance upon U.S. ex rel. Piperkoff v. Esperdy, 267 F.2d 72 (C.A.2, 1959). Insofar as that case holds that the time of first imposing judgment or passing sentence was not the time of the original sentencing but that of the first *coram nobis* proceeding vacating the original conviction, it would appear to support our conclusion. Moreover, as pointed out by the special inquiry officer, there is a basic and controlling distinction between that case and what occurred here. In the former, there was a new trial in the same cause after the original judgment was vacated. In the instant case, the original judgment of conviction was vacated. Thereafter, the state, in its discretion, filed a new accusation, and the original indictment was dismissed. Although the factual basis for the accusation was the same as for the original indictment, it nonetheless gave rise to a new, separate and distinct criminal proceeding.[3]

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[3] Respondent also cites U.S. ex rel. Klonis v. Davis, 13 F. 2d 630 (C.A. 2, 1926); Ex parte Eng, 77 F. Supp. 74 (N.D. Cal., 1948); United States v. Esposito, 67 F. Supp. 770 (E.D.N.Y., 1946); and U.S. ex rel. Arcara v. Flynn, 11 F. 2d 899 (W.D.N.Y., 1926). These cases are clearly inapposite. In none of them was the original judgment of conviction vacated. Rather, each involved a belated attempt to obtain a recommendation against deportation long after the original judgment.

The sole question remaining is whether there is reasonable, substantial, and probative evidence to support the Board's conclusion that (3) and (4) did not arise out of a single scheme of criminal misconduct. 8 U.S.C.A. §§ 1105 (a)(4), 1252(b)(4). Of course, any doubt in the interpretation of the statute must be resolved in favor of the alien because of the drastic consequences of deportation. Barber v. Gonzales, 347 U.S. 637, 642 (1954); Fong Haw Tan v. Phelan, 333 U.S. 6 (1948); Holzapfel v. Wyrsch, 259 F.2d 890, 893 (C.A.3, 1958). Additionally, we note that it is just as much the burden of the respondent to establish that the two crimes did not arise out of a single course of criminal misconduct as it is to prove that the alien was convicted of two crimes. Wood v. Hoy, 266 F.2d 825, 831 (C.A. 9, 1959). We think that on the record before us there is a lack of substantial evidence to support the Board's conclusion.

Petitioner did not testify on this point, and the only evidence introduced by the respondent was the record of convictions, including the indictments. These reveal convictions, as heretofore indicated, of the receipt of a stolen motor vehicle on July 17, 1958, and the theft of another vehicle belonging to a different person on the following day, July 18, 1958. Both offenses were committed in Bayonne, New Jersey. The Board, citing, inter alia, Wood v. Hoy, supra, held that the inference to be drawn from different crimes committed at different times against different persons is that they were separate and distinct unless there is evidence to the contrary. Conceding the validity of this proposition, we think its application to the facts of this case compels the opposite conclusion. The crimes for which petitioner was convicted are of the same nature and were committed within an interval of, at the very most, a day. In these circumstances, what was stated in Wood v. Hoy, 266 F.2d at 831, is fully applicable to the instant case:

> "It may be that in some cases the proof of the commission of two crimes may by the very nature of the

crimes themselves, or the time or circumstances of their commission, be reasonable, substantial and probative evidence that they did not arise out of a single scheme of criminal misconduct. We do not say that is not possible. However, that is not this case. * * * "

Indeed, in that case there was a three-day interval between the commission of the two offenses. For all we know from the record before us these crimes may have been perpetrated within a few minutes of each other. The test of substantial evidence is not met by evidence which gives equal support to inconsistent inferences. NLRB v. Shen-Valley Meat Packers, Inc., 211 F.2d 289, 293 (C.A.4, 1954); Zito v. Moutal, 174 F. Supp. 531 (N.D.Ill., 1959). The burden was upon the respondent to prove that the two critical acts were not part of "a single scheme of criminal misconduct." It has not met this burden.

The order of the Board will be reversed and the cause remanded with directions to terminate the deportation proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.